The Ontario Securities Commission

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The Ontario Securities Commission administers the
Securities Act of Ontario (R.S.O. 1990, c. S.5) and the
Commodity Futures Act of Ontario (R.S.O. 1990, c. C.20)

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Notices / News Releases

1.1 Notices

1.1.1 Current Proceedings Before The Ontario Securities Commission

JANUARY 8, 2010

CURRENT PROCEEDINGS

BEFORE

ONTARIO SECURITIES COMMISSION

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Unless otherwise indicated in the date column, all hearings will take place at the following location:

The Harry S. Bray Hearing Room
Ontario Securities Commission
Cadillac Fairview Tower
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20 Queen Street West
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David L. Knight, FCA	—	DLK
Patrick J. LeSage	—	PJL
Carol S. Perry	—	CSP
Charles Wesley Moore (Wes) Scott	—	CWMS

SCHEDULED OSC HEARINGS

January 11-18; January 20-29, 2010 10:00 a.m.	**Rene Pardo, Gary Usling, Lewis Taylor Sr., Lewis Taylor Jr., Jared Taylor, Colin Taylor and 1248136 Ontario Limited** s. 127
January 19, 2010 2:00 p.m.	M. Britton/J.Feasby in attendance for Staff Panel: JDC/KJK
January 11, 2010 10:00 a.m.	**Firestar Capital Management Corp., Kamposse Financial Corp., Firestar Investment Management Group, Michael Ciavarella and Michael Mitton** s. 127 H. Craig in attendance for Staff Panel: DLK
January 11, 2010 11:00 a.m.	**Peter Robinson and Platinum International Investments Inc.** s. 127 M. Boswell in attendance for Staff Panel: DLK
January 12, 2010 10:00 a.m.	**Shallow Oil & Gas Inc., Eric O'Brien, Abel Da Silva, Gurdip Singh Gahunia aka Michael Gahunia and Abraham Herbert Grossman aka Allen Grossman** s. 127(7) and 127(8) M. Boswell in attendance for Staff Panel: DLK
January 12, 2010 10:30 a.m.	**Abel Da Silva** s. 127 M. Boswell in attendance for Staff Panel: DLK

January 14, 2010	**Coventree Inc., Geoffrey Cornish and Dean Tai**
10:00 a.m.	s. 127
	J. Waechter in attendance for Staff
	Panel: JEAT
January 15, 2010	**W.J.N. Holdings Inc., MSI Canada Inc., 360 Degree Financial Services Inc., Dominion Investments Club Inc., Leveragepro Inc., Prosporex Investment Club Inc., Prosporex Investments Inc., Prosporex ltd., Prosporex Inc., Networth Financial Group Inc., Networth Marketing Solutions, Dominion Royal Credit Union, Dominion Royal Financial Inc., Wilton John Neale, Ezra Douse, Albert James, Elnonieth "Noni" James, David Whitely, Carlton Ivanhoe Lewis, Mark Anthony Scott, Sedwick Hill, Trudy Huynh, Dorlan Francis, Vincent Arthur, Christian Yeboah, Azucena Garcia, Angela Curry and Prosporex Forex SPV Trust**
10:00 a.m.	s. 127
	H. Daley in attendance for Staff
	Panel: CSP
January 18; January 20-29, 2010	**New Life Capital Corp., New Life Capital Investments Inc., New Life Capital Advantage Inc., New Life Capital Strategies Inc., 1660690 Ontario Ltd., L. Jeffrey Pogachar, Paola Lombardi and Alan S. Price**
10:00 a.m.	s. 127
January 19, 2010	S. Kushneryk in attendance for Staff
2:30 p.m.	Panel: DLK/MCH
January 19, 2010	**Borealis International Inc., Synergy Group (2000) Inc., Integrated Business Concepts Inc., Canavista Corporate Services Inc., Canavista Financial Center Inc., Shane Smith, Andrew Lloyd, Paul Lloyd, Vince Villanti, Larry Haliday, Jean Breau, Joy Statham, David Prentice, Len Zielke, John Stephan, Ray Murphy, Alexander Poole, Derek Grigor and Earl Switenky**
2:30 p.m.	s. 127 and 127.1
January 20 – February 1; February 3-12, 2010	Y. Chisholm in attendance for Staff
10:00 a.m.	Panel: PJL/PLK
February 2, 2010	**IBK Capital Corp. and William F. White**
2:30 p.m.	s. 127
	M. Vaillancourt in attendance for Staff
	Panel: DLK
January 20, 2010	**Lehman Cohort Global Group Inc., Anton Schnedl, Richard Unzer, Alexander Grundmann and Henry Hehlsinger**
9:00 a.m.	s. 127
	H. Craig in attendance for Staff
	Panel: JEAT/CSP/SA
January 25-26, 2010	**Irwin Boock, Stanton Defreitas, Jason Wong, Saudia Allie, Alena Dubinsky, Alex Khodjiaints Select American Transfer Co., Leasesmart, Inc., Advanced Growing Systems, Inc., International Energy Ltd., Nutrione Corporation, Pocketop Corporation, Asia Telecom Ltd., Pharm Control Ltd., Cambridge Resources Corporation, Compushare Transfer Corporation, Federated Purchaser, Inc., TCC Industries, Inc., First National Entertainment Corporation, WGI Holdings, Inc. and Enerbrite Technologies Group**
10:00 a.m.	s. 127 and 127.1
	H. Craig in attendance for Staff
	Panel: TBA
February 1; February 3-12; February 17-26, 2010	
10:00 a.m.	

February 2, 2010 2:30 p.m.	**Paladin Capital Markets Inc., John David Culp and Claudio Fernando Maya** s. 127 C. Price in attendance for Staff Panel: DLK
February 3, 2010 10:00 a.m.	**Uranium308 Resources Inc., Uranium308 Resources PLC., Michael Friedman, George Schwartz, Peter Robinson, Alan Marsh Shuman and Innovative Gifting Inc.** s. 127 M. Boswell in attendance for Staff Panel: DLK
February 5, 2010 10:00 a.m.	**Hillcorp International Services, Hillcorp Wealth Management, Suncorp Holdings, 1621852 Ontario Limited, Steven John Hill, John C. McArthur, Daryl Renneberg and Danny De Melo** s. 127 A. Clark in attendance for Staff Panel: TBA
February 8-12, 2010 10:00 a.m.	**Goldbridge Financial Inc., Wesley Wayne Weber and Shawn C. Lesperance** s. 127 J. Feasby in attendance for Staff Panel: TBA
February 17 – March 1, 2010 10:00 .m.	**M P Global Financial Ltd., and Joe Feng Deng** s. 127(1) M. Britton in attendance for Staff Panel: DLK/MCH
February 17, 2010 10:00 a.m.	**Maple Leaf Investment Fund Corp. and Joe Henry Chau** s. 127 J. Superina in attendance for Staff Panel: TBA
February 25, 2010 10:00 a.m.	**Tulsiani Investments Inc. and Sunil Tulsiani** s. 127 J. Superina in attendance for Staff Panel: JEAT
March 1; March 3-8, 2010 10:00 a.m. March 2, 2010 2:30 p.m.	**Teodosio Vincent Pangia** s. 127 J. Feasby in attendance for Staff Panel: TBA
March 3, 2010 10:00 a.m.	**Brilliante Brasilcan Resources Corp., York Rio Resources Inc., Brian W. Aidelman, Jason Georgiadis, Richard Taylor and Victor York** s. 127 S. Horgan in attendance for Staff Panel: TBA
March 10, 2010 10:00 a.m.	**Global Energy Group, Ltd. And New Gold Limited Partnerships** s. 127 H. Craig in attendance for Staff Panel: TBA
March 25-26, 2010 10:00 a.m.	**Gold-Quest International, 1725587 Ontario Inc. carrying on business as Health and Harmoney, Harmoney Club Inc., Donald Iain Buchanan, Lisa Buchanan and Sandra Gale** s. 127 H. Craig in attendance for Staff Panel: TBA
March 29; March 31 – April 1; April 6-9, 2010 10:00 a.m. March 30, 2010 2:30 p.m.	**Shane Suman and Monie Rahman** s. 127 and 127(1) C. Price in attendance for Staff Panel: JEAT/PLK

April 13, 2010 2:30 p.m.	**Axcess Automation LLC, Axcess Fund Management, LLC, Axcess Fund, L.P., Gordon Alan Driver and David Rutledge, Steven M. Taylor and International Communication Strategies** s. 127 M. Adams in attendance for Staff Panel: TBA
May 3-10; May 12-21; May 26-28, 2010 10:00 a.m.	**Sextant Capital Management Inc., Sextant Capital GP Inc., Sextant Strategic Opportunities Hedge Fund L.P., Otto Spork, Robert Levack and Natalie Spork** s. 127 S. Kushneryk in attendance for Staff Panel: TBA
May 31 – June 4, 2010 10:00 a.m.	**Lyndz Pharmaceuticals Inc., James Marketing Ltd., Michael Eatch and Rickey McKenzie** s. 127(1) and (5) J. Feasby in attendance for Staff Panel: TBA
June 29, 2010 10:00 a.m.	**Oversea Chinese Fund Limited Partnership, Weizhen Tang and Associates Inc., Weizhen Tang Corp., and Weizhen Tang** s. 127 and 127.1 M. Britton in attendance for Staff Panel: TBA
TBA	**Yama Abdullah Yaqeen** s. 8(2) J. Superina in attendance for Staff Panel: TBA
TBA	**Microsourceonline Inc., Michael Peter Anzelmo, Vito Curalli, Jaime S. Lobo, Sumit Majumdar and Jeffrey David Mandell** s. 127 J. Waechter in attendance for Staff Panel: TBA
TBA	**Frank Dunn, Douglas Beatty, Michael Gollogly** s. 127 K. Daniels in attendance for Staff Panel: TBA
TBA	**Juniper Fund Management Corporation, Juniper Income Fund, Juniper Equity Growth Fund and Roy Brown (a.k.a. Roy Brown-Rodrigues)** s. 127 and 127.1 D. Ferris in attendance for Staff Panel: TBA
TBA	**Merax Resource Management Ltd. carrying on business as Crown Capital Partners, Richard Mellon and Alex Elin** s. 127 H. Craig in attendance for Staff Panel: TBA
TBA	**Gregory Galanis** s. 127 P. Foy in attendance for Staff Panel: TBA

TBA

Franklin Danny White, Naveed Ahmad Qureshi, WNBC The World Network Business Club Ltd., MMCL Mind Management Consulting, Capital Reserve Financial Group, and Capital Investments of America

s. 127

C. Price in attendance for Staff

Panel: TBA

TBA

Biovail Corporation, Eugene N. Melnyk, Brian H. Crombie, John R. Miszuk and Kenneth G. Howling

s. 127(1) and 127.1

J. Superina, A. Clark in attendance for Staff

Panel: TBA

TBA

Global Partners Capital, Asia Pacific Energy Inc., 1666475 Ontario Inc. operating as "Asian Pacific Energy", Alex Pidgeon, Kit Ching Pan also known as Christine Pan, Hau Wai Cheung, also known as Peter Cheung, Tony Cheung, Mike Davidson, or Peter McDonald, Gurdip Singh Gahunia also known as Michael Gahunia or Shawn Miller, Basis Marcellinius Toussaint also known as Peter Beckford, and Rafique Jiwani also known as Ralph Jay

s. 127

M. Boswell in attendance for Staff

Panel: TBA

TBA

FactorCorp Inc., FactorCorp Financial Inc. and Mark Twerdun

s. 127

C. Price in attendance for Staff

Panel: TBA

TBA

Berkshire Capital Limited, GP Berkshire Capital Limited, Panama Opportunity Fund and Ernest Anderson

s. 127

E. Cole in attendance for Staff

Panel: TBA

TBA

MRS Sciences Inc. (formerly Morningside Capital Corp.), Americo DeRosa, Ronald Sherman, Edward Emmons and Ivan Cavric

s. 127 and 127(1)

D. Ferris in attendance for Staff

Panel: TBA

TBA

Barry Landen

s. 127

H. Craig in attendance for Staff

Panel: TBA

TBA

Imagin Diagnostic Centres Inc., Patrick J. Rooney, Cynthia Jordan, Allan McCaffrey, Michael Shumacher, Christopher Smith, Melvyn Harris and Michael Zelyony

s. 127 and 127.1

J. Feasby in attendance for Staff

Panel: TBA

TBA

Gold-Quest International, Health and Harmoney, Iain Buchanan and Lisa Buchanan

s. 127

H. Craig in attendance for Staff

Panel: TBA

TBA

Goldpoint Resources Corporation, Lino Novielli, Brian Moloney, Evanna Tomeli, Robert Black, Richard Wylie and Jack Anderson

s. 127(1) and 127(5)

M. Boswell in attendance for Staff

Panel: TBA

TBA	**Paul Iannicca** s. 127 H. Craig in attendance for Staff Panel: TBA
TBA	**Nest Acquisitions and Mergers and Caroline Frayssignes** s. 127(1) and 127(8) C. Price in attendance for Staff Panel: TBA
TBA	**IMG International Inc., Investors Marketing Group International Inc., and Michael Smith** s. 127 C. Price in attendance for Staff Panel: TBA
TBA	**Sulja Bros. Building Supplies, Ltd. (Nevada), Sulja Bros. Building Supplies Ltd., Kore International Management Inc., Petar Vucicevich and Andrew DeVries** s. 127 and 127.1 M. Britton in attendance for Staff Panel: TBA

ADJOURNED SINE DIE

Global Privacy Management Trust and Robert Cranston

S. B. McLaughlin

Livent Inc., Garth H. Drabinsky, Myron I. Gottlieb, Gordon Eckstein, Robert Topol

Portus Alternative Asset Management Inc., Portus Asset Management Inc., Boaz Manor, Michael Mendelson, Michael Labanowich and John Ogg

Maitland Capital Ltd., Allen Grossman, Hanouch Ulfan, Leonard Waddingham, Ron Garner, Gord Valde, Marianne Hyacinthe, Diana Cassidy, Ron Catone, Steven Lanys, Roger McKenzie, Tom Mezinski, William Rouse and Jason Snow

Global Petroleum Strategies, LLC, Petroleum Unlimited, LLC, Aurora Escrow Services, LLC, John Andrew, Vincent Cataldi, Charlotte Chambers, Carl Dylan, James Eulo, Richard Garcia, Troy Gray, Jim Kaufman, Timothy Kaufman, Chris Harris, Morgan Kimmel, Roger A. Kimmel, Jr., Erik Luna, Mitch Malizio, Adam Mills, Jenna Pelusio, Rosemary Salveggi, Stephen J. Shore and Chris Spinler

LandBankers International MX, S.A. De C.V.; Sierra Madre Holdings MX, S.A. De C.V.; L&B LandBanking Trust S.A. De C.V.; Brian J. Wolf Zacarias; Roger Fernando Ayuso Loyo, Alan Hemingway, Kelly Friesen, Sonja A. McAdam, Ed Moore, Kim Moore, Jason Rogers and Dave Urrutia

Hollinger Inc., Conrad M. Black, F. David Radler, John A. Boultbee and Peter Y. Atkinson

1.1.2 Notice of Amendments to the Securities Act and the Commodity Futures Act

NOTICE OF AMENDMENTS TO THE SECURITIES ACT AND THE COMMODITY FUTURES ACT

On December 15, 2009, the Government's Bill 218 (*Ontario Tax Plan for More Jobs and Growth Act, 2009*) received Royal Assent. Technical amendments to the *Securities Act* and the *Commodity Futures Act* were included in Bill 218. On the same date, the Government's Bill 212 (*Good Government Act, 2009*), containing further technical amendments to the *Commodity Futures Act*, also received Royal Assent.

An explanation of these amendments is provided in Chapter 9.

Questions may be referred to:

Simon Thompson
Senior Legal Counsel
(416) 593-8261
sthompson@osc.gov.on.ca

1.1.3 The Investment Funds Practitioner

January, 2010

THE INVESTMENT FUNDS PRACTITIONER

From the Investment Funds Branch, Ontario Securities Commission

What is the Investment Funds Practitioner?

The Practitioner is an overview of recent issues arising from applications for discretionary relief, prospectuses, and continuous disclosure documents that investment funds file with the OSC. It is intended to assist investment fund managers and their staff or advisors who regularly prepare public disclosure documents and applications for exemptive relief on behalf of investment funds.

The Practitioner is also intended to make you more broadly aware of some of the issues we have raised in connection with our reviews of documents filed with us and how we have resolved them. We hope that fund managers and their advisors will find this information useful and that the Practitioner can serve as a useful resource when preparing applications and disclosure documents.

The information contained in the Practitioner is based on particular factual circumstances. Outcomes may differ as facts change or as regulatory approaches evolve. We will continue to assess each case on its own merits.

The Practitioner has been prepared by staff of the Investment Funds Branch and the views it expresses do not necessarily reflect the views of the Commission or the Canadian Securities Administrators.

Request for Feedback

This is the fourth edition of the Practitioner. Previous editions of the Practitioner are available on the OSC website www.osc.gov.on.ca under Investment Funds – Related Information. We welcome your feedback and any suggestions for topics that you would like us to cover in future editions. Please forward your comments by email to investmentfunds@osc.gov.on.ca.

Applications for Relief

NI 81-107 and the Conflicts Provisions

As noted in the third edition of the Practitioner, we continue to see a number of novel applications for relief from the various conflicts provisions under the Act and NI 81-102 based on IRC approval. We remind filers that the CSA deliberately chose to maintain the various conflicts provisions in the legislation and codify only limited exemptions from them in NI 81-107, rather than replace them wholesale with a fund governance agency.

We intend to complete a series of reviews with a view to assessing how the IRC approval system is working with the existing codified exemptions. In the interim, we encourage filers to carefully consider the basis for any novel relief from the conflicts provisions before filing an application.

Mergers and Reorganizations

We have recently noted a number of recurring issues in connection with mutual fund mergers and reorganizations:

- **Not factoring securities regulatory approval into the transaction planning process:** Some filers have not properly factored securities regulatory approval into their transaction planning process. In a couple of instances, this put the planned closing dates for the transactions at risk. We remind filers that mergers or reorganizations of mutual funds that do not meet the pre-approval criteria in section 5.6 of NI 81-102 require the approval of the securities regulatory authority under section 5.5 before the transaction is implemented. If the transaction requires securityholder approval, staff may review the information circular that will be sent to securityholders as part of the review of the application. Accordingly, it is generally a good idea to file the application for regulatory approval before materials are sent to securityholders.

- **Applications missing required information:** Section 5.7 of NI 81-102 sets out the basic information that should be included in an application for securities regulatory approval including a description of those elements of the proposed transaction that make section 5.6 inapplicable. Recently, we have found that some applications lack the required information. In some instances, filers have sought to rely upon staff to conduct this analysis on their behalf. We remind filers of their responsibility to provide all of the information set out in section 5.7 including their analysis of the elements of the proposed transaction that make section 5.6 inapplicable.

- **Materials to be sent to securityholders:** Section 5.6(f) of NI 81-102 sets out what must be included in the materials sent to securityholders including, if not previously sent to securityholders, the current simplified prospectus. We remind filers of the requirement to send the simplified prospectus and financial statements. We note that, historically, the Director has only provided limited relief from this requirement to facilitate filers sending a tailored prospectus, rather than relief from the requirement in its entirety.

- **IRC review of fund mergers:** We have been raising comments on merger approval applications to question whether the fund manager has submitted the merger to the funds' independent review committee for its review and recommendation as we generally view a merger to be a conflict of interest matter referable to the funds' IRC under NI 81-107.

Fund on Fund Relief and the Conflicts Provisions
The Director sometimes grants relief under NI 81-102 to facilitate fund on fund arrangements that do not comply with all of the conditions in section 2.5(2) of NI 81-102. Such applications are sometimes accompanied by a parallel application for relief from the conflicts of interest prohibitions under the Act. This second application is normally filed out of concern that the exemption codified under section 2.5(7) of NI 81-102 may not apply in instances where the fund on fund arrangement is exempt from some of the conditions in section 2.5(2). We generally do not request that applicants file the parallel Act application. We intend to amend section 2.5(7) at the next available opportunity to clarify that it still applies even where a fund has obtained an exemption from some of the conditions in section 2.5(2).

Prospectuses

Timing for obtaining a Prospectus Receipt
We remind filers and their advisors wishing to receive a receipt for either a preliminary prospectus or a prospectus on a specific day that the preliminary prospectus or prospectus and all accompanying material should be received by us in acceptable form on or before 12:00 noon on the day the receipt is required. If you are filing a prospectus for an investment fund during peak filing periods, please note that it may take longer to issue a final receipt. In those cases, we will use our best efforts to issue a final receipt within 24 hours.

If materials are filed after 12:00 noon, the receipt will normally be issued before noon on the next business day and dated as of that day.

For more information, please refer to OSC Staff Notice 41-701 *Issuance of Receipts for Preliminary Prospectuses and Prospectuses*.

We have recently noted an increasing number of requests in connection with closed-end and exchange traded funds for us to issue final receipts by either the last Thursday or Friday of a month in order to accommodate the underwriters' desire to book offerings as business for that particular month. We do not generally consider this to be a compelling reason to expedite our prospectus review process. We encourage filers and their underwriters that wish a final receipt by a particular month-end to file their preliminary materials and any necessary applications for exemptive relief sufficiently in advance of month-end to allow for review and resolution of any regulatory issues that may arise.

At a minimum, filers and their underwriters should consider filing their preliminary materials and any necessary applications for exemptive relief in the month before the month-end they wish to go final. You may also wish to review the service standards posted on our website which provide that we will use our best efforts to complete our review of investment fund prospectuses within 40 working days. Our reviews may take longer than this period when a fund is novel or includes novel features.

Two-tiered Structured Products – Top and Bottom Fund Prospectuses
We have recently advised filers seeking prospectus receipts for top and bottom funds in two-tiered structures, where the returns of the top fund are tied to the investments of the bottom fund, to submit the prospectuses for both funds at the same time for staff's review. This is because changes to the bottom fund's prospectus as a result of staff's comments may need to be reflected in the prospectus of the top fund. Filers should factor into their overall transaction timelines that both the top and bottom fund prospectuses need to be reviewed and receipted.

Two-tiered Structured Products - Continuous Disclosure Undertakings
We have been raising comments on prospectuses filed for structured products where one fund obtains economic exposure to another through the use of a forward agreement. The comments are aimed at ensuring that investors will also receive on-going disclosure regarding the fund that forms the underlying interest under the forward agreement because this is where the actual substantive portfolio of the top fund is held. Filers have typically resolved these comments by agreeing to file an undertaking to

provide investors with the option of also receiving continuous disclosure of the underlying interest and providing disclosure to that effect in the prospectuses.[1]

Yield Disclosure
We have been raising comments in connection with indicative portfolio and yield disclosure in long form prospectuses for bond or dividend funds. The following responses have generally resolved the comments and, in our view, resulted in more balanced disclosure:

- Removing the indicative portfolio and any yield information from the cover page or summary and including it in the body of the prospectus only.
- Including cautionary disclosure about the differences there may be between the indicative portfolio and the fund's actual portfolio with respect to composition and yield.
- Removing any disclosure that describes what an investor would have earned on the investment had the fund been invested in the indicative portfolio for some past period of time.
- Including disclosure regarding the risk of default for bonds shown in an indicative bond portfolio in proximity to the indicative portfolio.

Filers may also wish to review the discussion contained in the Fall 2007 edition of the Practitioner regarding the disclosure of performance data.

Lapse Dates
We remind filers of section 2.7(4) of the Companion Policy to NI 81-101. This provision notes that an amendment to a prospectus of a mutual fund, even if it amends and restates the prospectus, does not change the date under Canadian securities legislation by which the mutual fund must renew the prospectus.

90 Day Limit between Prelim and Final
We remind filers that NI 41-101 and NI 81-101 prohibit a final prospectus from being filed more than 90 days after the preliminary receipt was issued. We encourage filers to keep track of this 90 day period.

In some cases, the Director has granted relief to allow filers to file the final prospectus beyond the 90 day period. These applications are more easily dealt with if the application is filed in a timely manner prior to the expiration of the 90 day period.

Auditor Consents
We remind filers of the requirements to file auditor consents contained in sections 2.6(1)(a) and 2.6(2) of NI 81-101. Section 2.6(2) also includes a requirement to file a consent in connection with future statements incorporated by reference at the time those future financial statements are filed.

The following is a general summary of some staff practices relating to the filing of auditor consents under NI 81-101 in connection with an amendment to a simplified prospectus and/or AIF.

- For slip-sheet amendments and amended and restated simplified prospectuses and AIFs, if new annual financial statements have been incorporated by reference since the date of filing the simplified prospectus and AIF, we will generally issue a comment regarding the filing of a new auditor's consent letter in respect of the new audited annual financial statements if the consent letter wasn't filed concurrently with the annual financial statements (see section 2.6 of NI 81-101).
- If there have been no new annual financial statements filed since the date of the simplified prospectus and AIF, but the slip-sheet amendment or the amended and restated simplified prospectus and AIF refers to a correction to the annual financial statements or contains amended information derived from annual financial statements, we will generally raise a comment regarding the filing of a new auditor's consent letter.

Best Efforts Offerings
We have noted a couple of recurring issues recently involving best efforts offerings. We remind long-form prospectus filers that conduct best-efforts offerings of the new 90 day limit to complete a best efforts offering. This limit is imposed under section 8.2 of NI 41-101.

[1] See, for instance, the disclosure provided in the prospectuses filed by Horizons AlphaPro Fiera Tactical Bond Fund dated June 29, 2009 and Marret High Yield Strategies Fund dated May 28, 2009 at pages 60 and 44 respectively.

Flow-Through LP Rollovers

- **IRC Review:** Prospectuses filed by flow-through LPs typically disclose that they will roll their assets into a related mutual fund and provide investors with units of the related mutual fund. This provides investors with a source of liquidity upon the termination of the flow-through LP. We have been raising comments to ask whether the manager of the mutual fund intends to refer the mutual fund's acquisition of the flow-through LP's assets to the mutual fund's IRC as we generally view the rollover to be a conflict of interest matter referable to the IRC of the mutual fund under NI 81-107.

- **Rollover Funds that are not Reporting Issuers:** As noted in the April 2007 edition of the Practitioner, we are continuing to raise comments if the flow-through LP discloses that it will roll its assets into a mutual fund that is not a reporting issuer due to our concerns with non-reporting issuers distributing securities to retail investors that may not otherwise qualify as exempt purchasers.

Unit Offerings and Calculation of Diluted NAV

We have been raising comments on unit offerings where the unit consists of a unit and a sweetener warrant that is exercisable at a set price for a limited period of time. The comments generally seek to confirm whether the fund intends to calculate and publish both a basic NAV and a diluted NAV.

Use of Consultants

We have noted an increasing trend of funds using consultants and managers marketing funds based upon the fund's relationship with a particular consultant. The fund's name often includes the name of the consultant and the prospectus discloses that the consultant will be providing the fund or the portfolio manager with varying forms of advice. We have been raising comments regarding whether the consultant is registered as an adviser. We encourage filers to think about this issue before filing a prospectus particularly when the fund is being prominently marketed based on its relationship with the consultant.

Continuous Disclosure

Review of NI 81-107 Related Disclosure

Investment Funds staff have started to review, on an issue-oriented basis, a sample of investment funds to evaluate compliance with the disclosure obligations introduced by NI 81-107. Our review began in Fall, 2009 and letters informing selected fund managers and funds of our review will be sent in due course.

Investment funds selected for review will be selected based on criteria designed to ensure a fair representation of fund family size and fund type.

Split Shares – MER Disclosure

We remind filers of the requirement contained under section 15.1(4) of NI 81-106 to calculate the MER for each class of securities. In the case of investment funds having capital shares and preferred shares outstanding, section 15.1(4) requires that MER be calculated for each of the capital shares and the preferred shares. We recognize that the preferred shares do not normally bear any costs until the net asset value of the capital shares has diminished completely. Preferred shares may also be considered as a liability to the capital shares and any distribution made to the preferred shares as interest costs to the capital shares. Consequently, we have been raising comments on both prospectus and continuous disclosure reviews to confirm whether a filer will be calculating MERs for each of the capital and preferred shares and whether the MER for the capital shares will include distributions paid on the preferred shares.

Public Inquiries

Related Party Underwritings of Approved Rating Debt Securities

We have received several inquiries regarding the meaning of approved rating under paragraph 4.1(4)(b) of NI 81-102. Section 4.1(4) provides an exemption from the prohibition contained under section 4.1(1) subject to several conditions including IRC approval and, if the securities underwritten are debt securities, the securities have been given and continue to have an approved rating by an approved rating organization.

Consistent with exemptive relief granted prior to the codification of the exemption under section 4.1(4), approved rating is intended to mean approved rating as defined under NI 44-101 and not approved credit rating as defined under NI 81-102.

1.1.4 OSC Staff Notice 11-739 (Revised) – Policy Reformulation Table of Concordance and List of New Instruments

OSC STAFF NOTICE 11-739 (REVISED)

POLICY REFORMULATION TABLE OF CONCORDANCE AND LIST OF NEW INSTRUMENTS

The following revisions have been made to the Table of Concordance and List of New Instruments. A full version of the Table of Concordance and List of New Instruments as of December 31, 2009 has been posted to the OSC Website at www.osc.gov.on.ca under Policy and Regulation/Status Summaries.

Table of Concordance

Item Key
The third digit of each instrument represents the following: 1-National/Multilateral Instrument; 2-National/Multilateral Policy; 3-CSA Notice; 4-CSA Concept Release; 5-Local Rule; 6-Local Policy; 7-Local Notice; 8-Implementing Instrument; 9-Miscellaneous

Reformulation

Instrument	Title	Status
	None	

New Instruments

23-404	CSA/IIROC Joint Consultation Paper – Dark Pools, Dark Orders and Other Developments in Market Structure in Canada	***Published for comment October 2, 2009***
13-502	Fees – Amendments	***Published for comment October 2, 2009***
13-503	Fees (under the *Commodity Futures Act*) – Amendments	***Published for comment October 2, 2009***
11-739	Policy Reformulation Table of Concordance and List of New Instruments (Revised)	***Published October 9, 2009***
21-703	Transparency of the Operations of Stock Exchanges and Alternative Trading Systems	***Published October 9, 2009***
23-102	Use of Client Brokerage Commissions and Companion Policy 23-102CP	***Notice of Commission approval published October 9, 2009***
81-101	Mutual Fund Prospectus Disclosure and Form 81-101F2 – Amendments (related to NI 23-102)	***Published for comment October 9, 2009***
41-101	General Prospectus Requirements and Form 41-102F2 – Amendments (related to NI 23-102)	***Published for comment October 9, 2009***
81-106	Investment Fund Continuous Disclosure – Amendments (related to IFRS)	***Published for comment October 16, 2009***
45-106	Prospectus and Registration Exemptions – Amendments (related to IFRS)	***Published for comment October 16, 2009***
31-102	Notice of Correction – 31-102CP – National Registration Database	***Published October 23, 2009***
31-103	Registration Requirements – Amendments (related to IFRS)	***Published for comment October 23, 2009***
33-109	Registration Information – Amendments (related to IFRS)	***Published for comment October 23, 2009***
91-702	Offerings of Contracts for Difference and Foreign Exchange Contracts to Investors in Ontario	***Published for comment October 30, 2009***

New Instruments

24-101	Institutional Trade Matching – Amendments	***Published for comment October 30, 2009***
58-305	Status Report on the Proposed Changes to the Corporate Governance Regime	***Published November 13, 2009***
21-101	Marketplace Operation – Amendments	***Notice of Commission approval published November 13, 2009***
23-101	Trading Rules - Amendments	***Notice of Commission approval published November 13, 2009***
51-330	Guidance Regarding the Application of Forward-looking Information Requirements under NI 51-102 Continuous Disclosure Obligations	***Published November 20, 2009***
51-331	Report on Staff's Review of Executive Compensation Disclosure	***Published November 20, 2009***
45-304	Notice of Local Exemptions Related to NI 45-106 Prospectus and Registration Exemptions and NI 31-103 Registration Requirements and Exemptions	***Published November 27, 2009***
51-706	Corporate Finance Branch Report 2009	***Published December 4, 2009***
11-753	Request for Comments Regarding Statement of Priorities for Fiscal Year Ending March 31, 2011(Revised)	***Published December 11, 2009***
31-313	NI 31-103 Registration Requirements and Exemptions and related instruments – Frequently Asked Questions as of December 18, 2009	***Published December 18, 2009***
62-305	Varying the Terms of Take-Over Bids	***Published December 18, 2009***
51-717	Corporate Governance and Environmental Disclosure	***Published December 18, 2009***
23-101	Notice of Technical Corrections to Amendments to NI 23-101 Trading Rules	***Published December 18, 2009***
51-101	Standards of Disclosure for Oil and Gas Activities	***Published for comment December 18, 2009***
23-102	Use of Client Brokerage Commissions	***Notice of Minister's approval published December 25, 2009***

For further information, contact:

Darlene Watson
Project Coordinator
Ontario Securities Commission
416-593-8148

January 8, 2010

1.1.5 Notice of Commission Approval – IIROC – UMIR Amendments – Provisions Respecting Trading During Certain Securities Transactions

INVESTMENT INDUSTRY REGULATORY ORGANIZATION OF CANADA (IIROC)

AMENDMENTS TO UNIVERSAL MARKET INTEGRITY RULES (UMIR) PROVISIONS RESPECTING TRADING DURING CERTAIN SECURITIES TRANSACTIONS

NOTICE OF COMMISSION APPROVAL

The Ontario Securities Commission approved amendments to UMIR relating to provisions respecting trading during certain securities transactions. In addition, the British Columbia Securities Commission did not object to, and the Alberta Securities Commission, the Autorité des marchés financiers, the Saskatchewan Financial Services Commission, the Nova Scotia Securities Commission and the New Brunswick Securities Commission approved, the proposed amendments.

The objective of the proposed amendments is to:

- peg the price restriction on purchases of a restricted security to the "best independent bid price" at the time of the entry of the order rather than the "last independent sale price" immediately prior to the execution of the order;
- provide that any mutual fund listed on an exchange that meets certain conditions would be an "Exempt Exchange-traded Fund" unless otherwise designated by a Market Regulator;
- make consequential amendments to the definition of "restricted private placement" as a result of changes to applicable securities legislation;
- clarify the definitions of "dealer-restricted person" and "restricted period";
- clarify that the orders to be taken into account in determining "best ask price" and "best bid price" are limited to orders on marketplaces then open for trading; and
- make a number of editorial amendments including: repealing the definition of "last independent sale price"; changing references from "Exchange-traded Fund" to "Exempt Exchange-traded Fund"; and clarifying the definition of "connected security".

The proposed amendments were published for comment on March 21, 2008, at (2008) 31 OSCB 3440. IIROC summarized the comments it received on the proposed amendments and provided responses. A summary of the comments and IIROC's responses, a blacklined copy of the proposed amendments showing the changes to the version published in March 2008 and a clean version are included in Chapter 13 of this Bulletin.

1.2 Notices of Hearing

1.2.1 Rezwealth Financial Services Inc. et al. – ss. 127(7), 127(8)

IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, c. S.5, AS AMENDED

AND

IN THE MATTER OF
REZWEALTH FINANCIAL SERVICES INC.,
PAMELA RAMOUTAR, CHRIS RAMOUTAR,
JUSTIN RAMOUTAR, TIFFIN FINANCIAL
CORPORATION, DANIEL TIFFIN,
2150129 ONTARIO INC. and SYLVAN BLACKETT

NOTICE OF HEARING
Sections 127(7) & 127(8)

WHEREAS the Ontario Securities Commission (the "Commission") issued a temporary order on December 22, 2009 (the "Temporary Order") pursuant to sections 127(1) and 127(5) of the *Securities Act*, R.S.O. 1990, c S.5. as amended (the "Act") ordering the following:

1. that all trading in any securities by Rezwealth Financial Services Inc. ("Rezwealth"), Tiffin Financial Corporation ("Tiffin Financial"), and 2150129 Ontario Inc. ("215 Inc.") or their agents or employees shall cease;

2. that all trading in securities by Pamela Ramoutar ("Pamela"), Chris Ramoutar ("Chris"), Justin Ramoutar ("Justin"), Daniel Tiffin ("Tiffin") and Sylvan Blackett ("Blackett") shall cease;

3. that the exemptions contained in Ontario securities law do not apply to Rezwealth, Tiffin Financial and 215 Inc. or their agents or employees; and

4. that the exemptions contained in Ontario securities law do not apply to Pamela, Chris, Justin, Tiffin and Blackett.

TAKE NOTICE THAT the Commission will hold a hearing pursuant to subsections 127(7) and 127(8) of the Act at the offices of the Commission, 17th Floor, 20 Queen Street West, Toronto, commencing on January 6, 2010 at 11:00 am or as soon thereafter as the hearing can be held;

TO CONSIDER whether it is in the public interest for the Commission:

1. to extend the Temporary Order pursuant to subsections 127(7) and 127(8) of the Act until the conclusion of the hearing or until such further time as considered necessary by the Commision; and

2. to make such further orders as the Commission considers appropriate;

BY REASON OF the facts recited in the Temporary Order and of such allegations and evidence as counsel may advise and the Commission may permit;

AND TAKE FURTHER NOTICE that any party to the proceeding may be represented by counsel at the hearing;

AND TAKE FURTHER NOTICE that upon failure of any party to attend at the time and place aforesaid, the hearing may proceed in the absence of that party and such party is not entitled to further notice of the proceeding.

Dated at Toronto this 22nd day of December, 2009

"Daisy G. Aranha"
per: John Stevenson
Secretary

1.3 News Releases

1.3.1 OSC Lays Charges Against Danny Silva De Melo and Steven John Hill in Ontario Court of Justice

FOR IMMEDIATE RELEASE
January 5, 2010

OSC LAYS CHARGES AGAINST
DANNY SILVA DE MELO AND
STEVEN JOHN HILL IN
ONTARIO COURT OF JUSTICE

TORONTO – The Ontario Securities Commission announces that on December 22, 2009 charges were laid in the Ontario Court of Justice under section 122 of the *Securities Act* against Danny Silva De Melo and Steven John Hill.

De Melo and Hill have been served with a summons to appear on January 15, 2010 at 9:00 am in the Ontario Court of Justice, 60 Queen Street West, in Toronto in courtroom 111.

De Melo and Hill are charged with breaching cease trade orders made by the Commission on July 21, July 24 and August 5, 2009.

Pursuant to section 122 of the *Securities Act*, anyone found guilty of an offence is liable on conviction to a fine of not more than $5 million or to imprisonment for a term of not more than five years less a day, or to both.

For media inquiries:

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Director, Communications & Public Affairs
416-593-8120

Theresa Ebden
Senior Communications Specialist
416-593-8307

Robert Merrick
Senior Communications Specialist
416-593-2315

For investor inquiries:

OSC Contact Centre
416-593-8314
1-877-785-1555 (Toll Free)

1.4 Notices from the Office of the Secretary

1.4.1 HSBC Bank Canada

FOR IMMEDIATE RELEASE
December 21, 2009

IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, c. S.5, AS AMENDED

AND

IN THE MATTER OF
HSBC BANK CANADA

TORONTO – Following a hearing held today, the Commission issued an Order approving the Settlement Agreement reached between Staff of the Commission and HSBC Bank Canada.

A copy of the Order dated December 21, 2009 with the settlement agreement attached as Appendix A is available at **www.osc.gov.on.ca**.

OFFICE OF THE SECRETARY
JOHN P. STEVENSON
SECRETARY

For media inquiries:

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1.4.2 Canadian Imperial Bank of Commerce and CIBC World Markets Inc.

FOR IMMEDIATE RELEASE
December 21, 2009

IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, c. S.5, AS AMENDED

AND

IN THE MATTER OF
CANADIAN IMPERIAL BANK OF COMMERCE
AND CIBC WORLD MARKETS INC.

TORONTO – Following a hearing held today, the Commission issued an Order approving the Settlement Agreement reached between Staff of the Commission and Canadian Imperial Bank of Commerce and CIBC World Markets Inc.

A copy of the Order dated December 21, 2009 with the settlement agreement attached as Appendix A is available at **www.osc.gov.on.ca**.

OFFICE OF THE SECRETARY
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SECRETARY

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1.4.3 Roger D. Rowan et al.

FOR IMMEDIATE RELEASE
December 22, 2009

IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, c. S.5, AS AMENDED

AND

IN THE MATTER OF
ROGER D. ROWAN, WATT CARMICHAEL INC.,
HARRY J. CARMICHAEL AND
G. MICHAEL McKENNEY

TORONTO – The Commission issued its Reasons and Decision on Sanctions and Costs and an Order in the above noted matter.

A copy of the Reasons and Decision on Sanctions and Costs and the Order dated December 21, 2009 are available at **www.osc.gov.on.ca**.

OFFICE OF THE SECRETARY
JOHN P. STEVENSON
SECRETARY

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1.4.4 Barry Landen

FOR IMMEDIATE RELEASE
December 23, 2009

IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, c. S.5, AS AMENDED

AND

IN THE MATTER OF
BARRY LANDEN

TORONTO – The Commission issued an Order which provides that the hearing is adjourned to January 8, 2010 at 2:00 p.m. or such other date as is agreed by the parties and determined by the Office of the Secretary for the purpose of continuing the pre-hearing conference.

A copy of the Order dated December 23, 2009 is available at **www.osc.gov.on.ca**.

OFFICE OF THE SECRETARY
JOHN P. STEVENSON
SECRETARY

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1-877-785-1555 (Toll Free)

1.4.5 MI Developments Inc.

FOR IMMEDIATE RELEASE
December 29, 2009

IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, c. S.5, AS AMENDED
(the "Act")

AND

IN THE MATTER OF
MI DEVELOPMENTS INC.
("MID")

TORONTO – The Commission issued its Reasons and Decision in the above named matter.

A copy of the Reasons and Decision dated December 23, 2009 is available at **www.osc.gov.on.ca**.

OFFICE OF THE SECRETARY
JOHN P. STEVENSON
SECRETARY

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Chapter 2

Decisions, Orders and Rulings

2.1 Decisions

2.1.1 Mackenzie Financial Corporation et al.

Headnote

MP 11-102 and NP 11-203 – exemption granted from: a) Investment Restrictions – s. 2.3(e), (f) and (h) of NI 81-102 to permit the Fund to invest up to 100% its net assets in gold, and up to 20% of its net assets in any combination of silver, platinum, gold or palladium, provided that at no time greater than 10% of the Fund's net assets be invested in any one of silver, platinum or palladium; and b) Custodian – s. 6.1(2), s. 6.1(3)(b), s. 6.2, s. 6.3 of NI 81-102 to permit the Fund to acquire, store and hold portfolio assets in and outside Canada through Brinks or Via Mat, for purposes other than facilitating portfolio transactions of the Fund.

Applicable Legislative Provisions

National Instrument NI 81-102 Mutual Funds, ss. 2.3(e), (f) and (h), 6.1(2), 6.1(3)(b), 6.2, 6.3, 19.1.

December 18, 2009

IN THE MATTER OF
THE SECURITIES LEGISLATION OF
ONTARIO
(the Jurisdiction)

AND

IN THE MATTER OF
THE PROCESS FOR EXEMPTIVE RELIEF
APPLICATIONS IN MULTIPLE JURISDICTIONS

AND

IN THE MATTER OF
MACKENZIE FINANCIAL CORPORATION
(the Manager)

AND

IN THE MATTER OF
MACKENZIE UNIVERSAL GOLD BULLION CLASS
(the Fund)

AND

IN THE MATTER OF
CANADIAN IMPERIAL BANK OF COMMERCE
(the Custodian)

AND

IN THE MATTER OF
THE BANK OF NOVA SCOTIA
(the Bullion Custodian)

DECISION

Background

The principal regulator in the Jurisdiction has received an application from the Manager for a decision under the securities legislation of the Jurisdiction of the principal regulator (the **Legislation**) for an exemption, pursuant to section 19.1 of National Instrument 81-102 *Mutual Funds* (**NI 81-102**), from the following provisions of NI 81-102:

(a) clause 2.3(e), to permit the Fund to purchase gold or a permitted gold certificate if, immediately after the purchase, more than 10% of the assets of the mutual fund, taken at market value at the time of the purchase, would consist of gold and permitted gold certificates;

(b) clauses 2.3(f) and (h), to permit the Fund to purchase silver, silver certificates, platinum, platinum certificates, palladium, palladium certificates, and/or derivatives of which the underlying interest is silver, platinum or palladium;

(c) clause 6.1(2)(b), to permit portfolio assets of the Fund to be held outside Canada by a custodian or sub-custodian, for purposes other than facilitating portfolio transactions of the Fund outside Canada;

(d) clause 6.1(3)(b), to permit the Custodian or the Bullion Custodian to appoint the Brinks Company or its subsidiaries or affiliates (**Brinks**), or Via Mat International Ltd. or its subsidiaries or affiliates (**Via Mat**), which are persons or companies that are not described in section 6.2 or 6.3, to act as sub-custodians to hold the Fund's physical bullion;

(e) section 6.2 to permit Brinks and Via Mat to be appointed as sub-custodians of the Fund to hold the Fund's physical bullion in Canada; and

(f) section 6.3, to permit Brinks and Via Mat to be appointed as sub-custodians of the Fund to hold the Fund's physical bullion outside Canada

(collectively, the **Exemption Sought**).

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a passport application):

(a) the Ontario Securities Commission is the principal regulator for this application; and

(b) the Manager has provided notice that section 4.7(1) of Multilateral Instrument 11-102 *Passport System* (**MI 11-102**) is intended to be relied upon in British Columbia, Alberta, Saskatchewan, Manitoba, Québec, Nova Scotia, New Brunswick, Prince Edward Island, Newfoundland and Labrador, Northwest Territories, the Yukon Territory and Nunavut, where applicable.

Interpretation

Terms defined in NI 81-102, National Instrument 14-101 Definitions and MI 11-102 have the same meaning if used in this decision, unless otherwise defined.

Representations

This decision is based on the following facts represented by the Manager:

The Fund

1. The Manager is a corporation incorporated under the laws of the Province of Ontario and holds a registration in the category of "portfolio manager" in Ontario, Alberta and Manitoba. The head office of the Manager is in Toronto, Ontario. The Manager will act as the manager and portfolio adviser for the Fund.

2. The Fund will be an open-end mutual fund. The Fund will be a class of Mackenzie Financial Capital Corporation, a mutual fund corporation existing under the laws of the Province of Ontario.

3. Neither the Manager nor any of the mutual funds for which it acts as manager is in default of securities legislation in any Jurisdiction.

4. A preliminary simplified prospectus and annual information form for the Fund was filed via SEDAR under project No. 1488675 on October 23, 2009. Once a final prospectus (the **Final Prospectus**) and annual information form (the **Final Annual Information Form**) for the Fund is filed and receipt is obtained, the Fund will be a "reporting issuer" or equivalent in each Jurisdiction.

5. The investment objective of the Fund is to pursue long-term growth of capital by investing primarily, directly or indirectly, in gold. The Fund may also invest from time to time, directly or indirectly, in silver, platinum, palladium and/or equity securities of companies which produce or supply precious metals.

6. The Fund will seek to achieve its investment objective by investing:

   (a) a minimum of 80% and up to 100% of its net asset value, taken at the market value at the time of investment, in gold bullion and/or permitted gold certificates (as such term is defined in securities legislation); and

   (b) an aggregate of up to 20% of its net asset value, taken at the market value at the time of investment, in silver bullion, platinum bullion, palladium bullion, derivatives of which the underlying interest is silver, platinum or palladium, silver certificates, platinum certificates, palladium certificates and/or equity securities of companies which produce or supply precious metals, provided that no more than 10% of the Fund's net asset value, taken at market value at the time of investment, will be invested in any one of silver, platinum or palladium (including derivatives or certificates).

   Instead of investing directly in equity securities, the Fund may also from time to time invest up to 10% of its net assets in securities of other mutual funds managed by the Manager (**Underlying Funds**). The criteria used for selecting Underlying Funds are the same as the criteria for selecting individual securities, as described elsewhere in the Fund's investment objectives and strategies. There will be no duplication of management fees, incentive fees or sales charges between the mutual funds.

Custody of Bullion Held by the Fund

7. Pursuant to a Master Custodian Agreement dated February 24, 2005, the Custodian acts as the custodian for all mutual funds managed by the Manager. The Custodian will hold the property of the Fund other than the Fund's physical gold, silver, platinum and palladium bullion. The terms of the Custodian Agreement will comply with all requirements in Part 6 of NI 81-102.

8. The Custodian will appoint the Bullion Custodian to be a sub-custodian of the Fund, to hold the Fund's physical gold, silver, platinum and palladium bullion. The custody arrangements with respect to the Fund's physical gold, silver, platinum and palladium bullion will be governed by the terms of an agreement between the Custodian and the Bullion Custodian (the **Bullion Custodian Agreement**). Except as represented below, the terms of the Bullion Custodian Agreement will comply with all requirements in Part 6 of NI 81-102.

9. The Fund's physical gold, silver, platinum and palladium bullion will be stored and held on an allocated and segregated basis in the vault facilities of ScotiaMocatta, a division of the Bullion Custodian, in Canada, London or New York. ScotiaMocatta is one of the largest providers of physical precious metals trading and custodial services in the world. The Manager has

determined that the Bullion Custodian would be the appropriate choice to provide custodial services to the Fund, because ScotiaMocatta is experienced in providing gold, silver, platinum and palladium storage and custodial services, and is familiar with the requirements relating to the physical handling and storage of gold, silver, platinum and palladium bullion.

10. The Fund will not insure its physical gold, silver, platinum or palladium bullion. The Bullion Custodian maintains insurance on such terms and conditions as it considers appropriate against all risk of physical loss of, or damage to, bullion stored in ScotiaMocatta's vaults except the risk of war, nuclear incident, terrorism events or government confiscation. Neither the Manager, the Fund nor the Custodian is a beneficiary of any such insurance and none of them have the ability to dictate the existence, nature or amount of coverage.

11. The Manager has discussed such insurance coverage with the Bullion Custodian, and believes that the insurance that the Bullion Custodian has obtained will be appropriate for the Fund. The Bullion Custodian Agreement shall provide that the Bullion Custodian shall not cancel its insurance except upon 30 days prior written notice to the Manager. The Fund will disclose the material details of that insurance arrangement in its Final Annual Information Form.

12. The Bullion Custodian has advised the Manager and the Custodian that due to physical storage capacity constraints, having regard to the amount of gold, silver, platinum and palladium bullion which the Fund may acquire, there may not be sufficient space in the vault facilities of ScotiaMocatta, in Canada, London and New York, to store all of the Fund's physical gold, silver, platinum and palladium bullion.

13. As a result, the Bullion Custodian will be required to use the services of sub-custodians to store some of the Fund's physical gold, silver, platinum and palladium bullion.

14. The Bullion Custodian has advised the Custodian and the Manager that it proposes to use Brinks and Via Mat, as sub-custodians to hold the physical gold, silver, platinum and palladium bullion of the Fund. Brinks and Via Mat are not entities that are currently approved to act as a custodian or sub-custodian for assets held in Canada, or to act as a sub-custodian for assets held outside of Canada as Brinks and Via Mat are not, among other things, a bank listed in Schedule I, II or III of the *Bank Act* (Canada) or a trust company incorporated under the laws of Canada.

15. Brinks and Via Mat are leading providers of secure logistics for valuables, including diamonds, jewellery, precious metals, securities, currency and secure data, serving banks, retailers, governments, mines, refiners, metal traders, and diamantaires. Brinks and Via Mat are both authorized depositories for the London Bullion Market Association and have vault facilities that are accepted as warehouses for the London Bullion Market Association. Brinks is also an authorized depository for NYMEX/COMEX.

16. The number of entities in Canada which are eligible to act as sub-custodians for the physical storage of silver bullion is limited. Of these eligible entities, some already have exclusive relationships with other investment funds for storage purposes whereas others simply may not have the excess capacity that the Fund may need to store physical silver bullion and have advised that they may be required to secure additional space through the vaulting facilities of service providers. These capacity constraints have been intensified due to the relatively recent run-up in demand for physical commodities and the corresponding need to arrange for safe-keeping.

17. The Manager and the Bullion Custodian believe that both Brinks and Via Mat are appropriate sub-custodians for the Fund's physical gold, silver, platinum and palladium bullion. The Bullion Custodian has engaged in a review of the facilities, procedures, records and the level of insurance coverage of Brinks and Via Mat, and will engage in a similar review annually, to satisfy itself as to the continuing appropriateness of using Brinks and Via Mat as sub-custodians of the Fund's physical bullion.

18. The custody arrangements with respect to the holding of the Fund's physical gold, silver, platinum and palladium bullion by Brinks or Via Mat will be governed by the terms of an agreement between the Bullion Custodian and Brinks or Via Mat, as applicable (the **Bullion Sub-Custodian Agreements**), the terms of which will comply with Sections 6.4 and 6.5 of NI 81-102.

19. The sub-custodial activities of Brinks and Via Mat will be limited to holding the Fund's physical gold, silver, platinum and palladium bullion. All physical gold, silver, platinum and palladium bullion of the Fund held by Brinks and Via Mat will be held in vault facilities in Canada, London or New York, on an allocated and segregated basis. The Bullion Custodian will exercise its audit rights under each Bullion Sub-Custodian Agreement on an on-going basis in order to satisfy itself that Brinks and Via Mat are in substantial compliance with the terms of the relevant Bullion Sub-Custodian Agreement and, in particular, that the bullion of the Fund which the Bullion Custodian has transferred to Brinks and Via Mat on behalf of the Fund (i) is held by Brinks and Via Mat at vault facilities that are accepted as warehouses for the London

Bullion Market Association, (ii) is physically segregated and specifically identified, both in the vault facilities in which such bullion is held by Brinks and Via Mat and on the books and records of Brinks and Via Mat, as constituting the property of the Bullion Custodian or the Fund, (iii) has not sustained loss, damage or destruction (but with no obligation on the part of the Bullion Custodian to verify the weight, quality, fineness, assay characteristics, authenticity or composition of such bullion or that such bullion conforms to any good delivery standards of the London Bullion Market Association, NYMEX/COMEX, the London Platinum and Palladium Market Association or any other bullion trading body or that such bullion is otherwise fit for any purpose), and (iv) remains the subject of a subsisting policy of insurance that covers Brinks' and Via Mat's liability for the loss, damage or destruction of such bullion.

20. The Bullion Custodian has advised the Fund and the Manager that each of Brinks and Via Mat have arranged for sufficient insurance coverage in respect of any of the Fund's physical gold, silver, platinum and/or palladium bullion held by the Bullion Custodian through the vault facilities of Brinks or Via Mat. The Manager has discussed the insurance coverage obtained by Brinks and Via Mat with the Bullion Custodian, and believes that the insurance coverage obtained by Brinks and Via Mat is appropriate for the Fund.

21. Pursuant to the Custodian Agreement, in safekeeping the property of the Fund the Custodian is required to exercise (a) the degree of care, diligence and skill that a reasonably prudent person would exercise in the circumstances; or (b) at least the same degree of care as it exercises with respect to its own property of a similar kind, if this is a higher degree of care than the degree of care referred to in (a). In addition, pursuant to the Custodian Agreement, the Custodian is not entitled to an indemnity from the Fund in the event the Custodian breaches its standard of care. The Bullion Custodian Agreement will include a similar standard of care in respect of the obligations of the Bullion Custodian and a similar provision in respect of the Bullion Custodian's indemnity. The Bullion Custodian has satisfied itself that the degree of care to which Brinks and Via Mat are subject in respect of the Bullion Sub-Custodian Agreements is no less than the degree of care referred to in (a).

22. The Bullion Custodian Agreement provides that, in addition to any other rights of the Fund thereunder, the Bullion Custodian shall indemnify and hold harmless the Fund in respect of all direct loss, damage or expense arising out of any negligence, wilful misconduct, fraud or lack of good faith by the Bullion Custodian or any subcustodian or sub-subcustodian (including Brinks and Via Mat) in respect of the services contemplated thereunder, provided however, that the liability for any loss, damage or expense to which the above indemnity would apply shall be limited to losses, damages or expenses as follows:

    a. in the case of the loss of bullion or any other property of the Fund, such bullion or other property shall be replaced where commercially practicable and reasonably feasible; provided, however, that, in the context of bullion, the replacement bullion which is to be provided by the Bullion Custodian shall be of the same fineness and shall be in the same form as the allocated bullion actually delivered and then held by the Bullion Custodian at the time of the incurrence of the relevant loss (and, in such respect, the Bullion Custodian's opinion shall be determinative as to such fineness and form);

    b. where replacement of such bullion or other property is not commercially practicable and reasonably feasible, the Fund shall be paid the market value of such bullion based upon fineness and the form of the allocated bullion actually delivered and then held by the Custodian at the time of the incurrence of the relevant loss (and, in such respect, the Bullion Custodian's opinion shall be determinative as to such fineness and form) or other property at the time the loss is discovered; and

    c. in any other case, the amount of any interest or income to which the Fund is entitled, but which is not received by the Fund, shall be paid to it.

23. The Bullion Custodian Agreement provides that if the Fund suffers a loss as a result of any act or omission of a subcustodian (including Brinks and Viamat), or of any other agent appointed by the Bullion Custodian (rather than appointed by the Manager) and if such loss is directly attributable to the failure of such agent to comply with its standard of care in the provision of any service to be provided by it under the Bullion Custodian Agreement or the applicable Bullion Sub-Custodian Agreement, then the Bullion Custodian shall assume liability for such loss directly, and shall reimburse the Fund accordingly.

24. The Fund's auditors will be present during, and will verify, a physical count of all of the Fund's physical gold, silver, platinum and palladium bullion, whether held by the Bullion Custodian, Brinks or Via Mat, at least once every year. The Fund and its auditors will have the ability, with sufficient advance notice to the Bullion Custodian,

Brinks and/or Via Mat, to attend at the vaults of the Bullion Custodian, Brinks and/or Via Mat as required to verify the gold, silver, platinum and palladium bullion held by the Bullion Custodian, Brinks or Via Mat on behalf of the Fund.

25. All bullion purchased by the Fund will be certified by the relevant vendor as bullion conforming to the good delivery standards of the London Bullion Market Association, the London Platinum and Palladium Market, or another internationally recognized bullion trading body.

Investment in Gold

26. The Fund's investment objectives and investment strategies are designed to offer investors an opportunity to obtain exposure primarily to gold. To fulfill its investment objectives, the Fund requires the ability to invest primarily in gold and/or permitted gold certificates beyond the limits set out in clause 2.3(e) of NI 81-102.

27. The Manager submits that there are no liquidity concerns with permitting the Fund to invest in gold bullion or permitted gold certificates beyond the limits of NI 81-102, since the market for gold bullion and permitted gold certificates is highly liquid.

Investment in Silver, Platinum and Palladium

28. The Manager has also requested exemptive relief that would permit it to invest an aggregate of up to 20% of its net asset value, taken at the market value at the time of investment, in silver bullion, platinum bullion, palladium bullion, derivatives of which the underlying interest is silver, platinum or palladium, silver certificates, platinum certificates, palladium certificates and/or equity securities of companies which produce or supply precious metals, provided that no more than 10% of the Fund's net asset value, taken at market value at the time of investment, will be invested in any one of silver, platinum or palladium (including derivatives or certificates).

29. Similar to the market for gold bullion and gold certificates, the Manager submits that the markets for silver, platinum and palladium are also highly liquid, and there are no liquidity concerns with permitting the Fund to invest in these precious metals to a limit not to exceed an aggregate limit of 20% of the net assets of the mutual fund, taken at market value at the time of purchase.

30. The Manager submits that permitting the investments in silver, platinum, and palladium along with gold, will give the portfolio manager additional flexibility in certain market conditions, which may have otherwise caused the Fund to have significant cash positions and therefore deter from its ability to achieve its investment objective of providing long-term growth of capital.

31. The Manager submits that the potential volatility or speculative nature of silver, platinum or palladium (or the equivalent in certificates or specific derivatives of which the underlying interest is silver, platinum or palladium) is no greater than that of gold or of equity securities of issuers in which the Fund intends to invest and, in the context of the Fund's overall portfolio, will provide investors with additional diversification.

32. As the aggregate investments in silver, platinum and palladium (or the equivalent in certificates or specified derivatives of which the underlying interest is silver, platinum or palladium) would be 20% or less of the net assets of the Fund, taken at the market value thereof at the time of investment, the Manager submits that there would be no significant change in the risk profile of the Fund. The Final Prospectus will state that the Fund will invest in precious metals and the risks associated with such investments.

Decision

The principal regulator is satisfied that the decision meets the test set out in the Legislation for the principal regulator to make the decision.

The decision of the principal regulator under the Legislation is that the Exemption Sought is granted, provided that:

(a) no more than 10% of the Fund's net assets, taken at the market value thereof at the time of investment, will be invested in any one of silver, platinum or palladium (including specified derivatives and certificates);

(b) the Manager, on behalf of the Fund, ensures that any silver, platinum and palladium certificates purchased by the Fund are certificates representing such metal if the metal is:

(i) available for delivery in Canada, free of charge, to or to the order of the holder of the certificate,

(ii) of a minimum fineness of 999 parts per 1,000,

(iii) held in Canada,

(iv) in the form of either bars or wafers, and

(v) if not purchased from a bank listed in Schedule I, II or III of the Bank Act (Canada), fully insured against loss and bank-

ruptcy by an insurance company licensed under the laws of Canada or a jurisdiction;

(b) in respect of the relief granted from sections 6.1(2)(b), 6.1(3)(b), 6.2 and 6.3, the Fund, the Manager, the Custodian and the Bullion Custodian are limited to using Brinks and Via Mat as sub-custodians for the gold, silver, platinum and palladium bullion of the Fund which will be held only in Canada, London and New York;

(c) in respect of the compliance reports to be prepared by the Custodian pursuant to section 6.7 of NI 81-102, in lieu of including the information required by paragraphs 6.7(1)(a), 6.7(1)(b), 6.7(1)(c) and 6.7(2)(b) and (c) in respect of the Custodian's review of the sub-custodian arrangements involving Brinks and Via Mat, the Custodian shall instead by entitled to rely on a certificate of the Bullion Custodian prepared in respect of the Bullion Custodian's annual review process for Brinks and Via Mat referred to in paragraph 17 above, and whether the Bullion Custodian remains of the view that Brinks and Via Mat continue to be appropriate sub-sub-custodians to hold the Fund's physical gold, silver, platinum and palladium bullion; and

(d) the Manager, on behalf of the Fund, ensures that the Final Prospectus of the Fund contains disclosure regarding the unique risks associated with an investment in the Fund, including the risk that direct purchases of gold, silver, platinum and palladium by the Fund may generate higher transaction and custody costs than other types of investments, which may impact the performance of the Fund.

'Darren McKall'
Assistant Manager, Investment Funds Branch
Ontario Securities Commission

2.1.2 Contrans Income Fund – s. 1(10)

Headnote

National Policy 11-203 Process for Exemptive Relief Applications in Multiple Jurisdictions – application for an order that the issuer is not a reporting issuer.

Ontario Statutes

Securities Act, R.S.O. 1990, c. S.5, as am., s. 1(10).

December 22, 2009

Contrans Income Fund
P.O. Box 1669
1179 Ridgeway Road
Woodstock, ON N4S 0A9

Dear Sir or Madam:

Re: Contrans Income Fund (the "Applicant") - Application for a decision under the securities legislation of Ontario, Alberta, Saskatchewan, Manitoba, Quebec, Newfoundland and Labrador, New Brunswick, Nova Scotia, Prince Edward Island, Yukon, the Northwest Territories and Nunavut (the "Jurisdictions") that the Applicant is not a reporting issuer

The Applicant has applied to the local securities regulatory authority or regulator (the "Decision Maker") in each of the Jurisdictions for a decision under the securities legislation (the "Legislation") of the Jurisdictions that the Applicant is not a reporting issuer.

As the Applicant has represented to the Decision Makers that:

(a) the outstanding securities of the Applicant, including debt securities, are beneficially owned, directly or indirectly, by fewer than 15 security holders in each of the Jurisdictions and fewer than 51 security holders in total in Canada;

(b) no securities of the Applicant are traded on a marketplace as defined in National Instrument 21-101 *Marketplace Operation*;

(c) the Applicant is applying for a decision that it is not a reporting issuer in all of the Jurisdictions in which it is currently a reporting issuer; and

(d) the Applicant is not in default of any of its obligations under the Legislation as a reporting issuer,

each of the Decision Makers is satisfied that the test contained in the Legislation that provides the Decision Maker with the jurisdiction to make the decision has been met and orders that the Applicant is not a reporting issuer.

"Naizam Kanji"
Deputy Director, Corporate Finance
Ontario Securities Commission

2.1.3 Gildan Activewear Inc.

Headnote

National Policy 11-203 Process for Exemptive Relief Applications in Multiple Jurisdictions – National Instrument 51-102 Continuous Disclosure Obligations – Issuer requires relief from the requirement in section 3.3 of Form 51-102F6 Statement of Executive Compensation (in respect of financial years ending on or after December 31, 2008) that amounts reported in its management information circular be reported using the same currency as that used in its financial statements – Issuer uses the US dollar as its reporting currency in its annual and interim financial statements and MD&A – Four out of five of the Issuer's most highly compensated executive officers are currently paid in Canadian dollars – The Canadian dollar is a convenient and relevant reporting currency for amounts disclosed pursuant to Form 51-102F6 for a Canadian issuer whose securities are listed on the TSX.

Applicable Legislative Provisions

National Instrument 51-102 Continuous Disclosure Obligations, s. 13.1.
Form 51-102F6 Statement of Executive Compensation (in respect of financial years ending on or after December 31, 2008), s. 3.3.

December 23, 2009

IN THE MATTER OF
THE SECURITIES LEGISLATION OF
QUEBEC AND ONTARIO
(the "Jurisdictions")

AND

IN THE MATTER OF
THE PROCESS FOR EXEMPTIVE RELIEF
APPLICATIONS IN MULTIPLE JURISDICTIONS

AND

IN THE MATTER OF
GILDAN ACTIVEWEAR INC.
(the "Filer")

DECISION

Background

The securities regulatory authority or regulator in each of the Jurisdictions (the "Decision Maker") has received an application from the Filer for a decision under the securities legislation of the Jurisdictions (the "Legislation") exempting the Filer from the requirement in section 3.3 of Form 51-102F6 *Statement of Executive Compensation* ("Form 51-102F6") of *Regulation 51-102 respecting Continuous Disclosure Obligations* ("Regulation 51-102"), pursuant to which amounts reported in Form 51-102F6 must use the same currency that the Filer uses in its financial statements (the "Requested Relief").

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a dual application):

1. the *Autorité des marchés financiers* is the principal regulator for this application;

2. the Filer has provided notice that section 4.7(1) of *Regulation 11-102 respecting Passport System* ("Regulation 11-102") is intended to be relied upon in British Columbia, Alberta, Saskatchewan, Manitoba, New Brunswick, Nova Scotia, Newfoundland and Labrador and Prince Edward Island; and

3. the decision is the decision of the principal regulator and evidences the decision of the securities regulatory authority or regulator in Ontario.

Interpretation

Terms defined in *Regulation 14-101 respecting Definitions*, Regulation 11-102 and Regulation 51-102 have the same meaning if used in this decision, unless otherwise defined.

Representations

This decision is based on the following facts represented by the Filer:

1. the Filer is incorporated under the *Canada Business Corporations Act* ("CBCA"), with its head office located in Montréal, Quebec;

2. the Filer is a reporting issuer in each of the provinces of Canada and is not in default of its reporting issuer obligations in any jurisdiction;

3. the Filer's common shares are listed on both the Toronto Stock Exchange and the New York Stock Exchange under the symbol "GIL";

4. the Filer's financial year end is the first Sunday following September 28 of each year;

5. the Filer uses the United States dollar as its reporting currency in its annual and interim financial statements and corresponding management's discussion and analysis;

6. four out of five of the Filer's most highly compensated executive officers, whose compensation must be disclosed in detail in the Filer's information circular, are currently paid by the Filer in Canadian dollars;

7. section 3.3 of the current Form 51-102F6 came into force on December 31, 2008, and it applies to issuers in respect of financial years ending on or after December 31, 2008;

8. given its financial year end, the Filer's first completed financial year since the coming into

force of Section 3.3 of Form 51-102F6 is the financial year ended October 4, 2009;

9. pursuant to section 3.3 of Form 51-102F6, the Filer is required to report amounts using the same currency that it uses in its financial statements;

10. the Filer disclosed the executive compensation amounts in Canadian dollars in its previous circular;

11. the Canadian dollar is a convenient and relevant reporting currency for amounts disclosed pursuant to Form 51-102F6 for a Canadian corporation whose securities are listed on the Toronto Stock Exchange; and

12. the Filer will provide executive compensation information for the last two years in Canadian dollars for comparative purposes in the information circular to be sent to its shareholders in connection with its annual meeting of shareholders to be held on February 10, 2010.

Decision

Each of the Decision Makers is satisfied that the decision meets the test set out in the Legislation for the Decision Maker to make the decision.

The decision of the Decision Makers under the Legislation is that the Requested Relief is granted.

"Josée Deslauriers"
Director, Investment Funds and Continuous Disclosure
Autorité des marchés financiers

2.1.4 PowersShares India Class

Headnote

NP 11-203 – Process for Exemptive Relief Applications in Multiple Jurisdictions – fund on fund structure – mutual fund granted exemption from the three-tiered prohibition to invest in another mutual fund that invests substantially all of its assets in a bottom fund to gain exposure to a specific country's capital markets.

Applicable Legislative Provisions

National Instrument 81-102 Mutual Funds, ss. 2.5(2)(b), 19.1.

December 23, 2009

IN THE MATTER OF
THE SECURITIES LEGISLATION OF
ONTARIO
(the "Jurisdiction")

AND

IN THE MATTER OF
THE PROCESS FOR EXEMPTIVE RELIEF
APPLICATIONS IN MULTIPLE JURISDICTIONS

AND

IN THE MATTER OF
POWERSHARES INDIA CLASS
(the "Top Fund" or "Filer")

DECISION

Background

The principal regulator in the jurisdiction has received an application from the Filer for a decision under the securities legislation of the Jurisdiction of the principal regulator (the **Legislation**) for an exemption from the restriction in subclause 2.5(2)(b) of National Instrument 81-102 *Mutual Funds* (**NI 81-102**) that would prevent the Top Fund from investing in the PowerShares India Portfolio (**PowerShares ETF**) (the **Exemption Sought**).

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions:

(a) The Ontario Securities Commission is the principal regulator for this application; and

(b) The Filer has provided notice that section 4.7(1) of Multilateral Instrument 11-102 *Passport System* (**MI 11-102**) is intended to be relied upon in the following non-principal passport jurisdictions: British Columbia, Alberta, Saskatchewan, Manitoba, Quebec, New Brunswick, Nova Scotia, Newfoundland and Labrador, Prince Edward Island, the Northwest Territories, the Yukon

Territories and Nunavut (together with Ontario, the **Jurisdictions**).

Interpretation

Terms defined in National Instrument 14-101 *Definitions* and MI 11-102 have the same meaning if used in this decision, unless otherwise defined herein. The following additional terms shall have the following meanings:

Mauritius means the Republic of Mauritius; and

Mauritius Underlying Fund means a wholly-owned subsidiary of the PowerShares ETF in the Republic of Mauritius.

Representations

This decision is based on the following facts represented by the Filer:

The Top Fund

1. The Top Fund will be an open-end mutual fund established under the laws of Canada as a class of shares of Invesco Trimark Corporate Class Inc. and be qualified for distribution in the Jurisdictions by way of a simplified prospectus and annual information form that are prepared in accordance with NI 81-102 and will be subject to NI 81-102. It is anticipated that the Top Fund will file in order to qualify the shares of the Top Fund for distribution in all of the Jurisdictions a preliminary simplified prospectus and annual information form in late November 2009.

2. Invesco Trimark Ltd. will be the manager of the Top Fund (the **Manager**). The head office of the Manager is located in Toronto, Ontario.

3. The Top Fund will be a reporting issuer in each of the Jurisdictions.

4. The investment objective of the Top Fund will be to seek to gain exposure to India's capital markets through investments in the PowerShares ETF and is expected to be expressed as follows:

   "PowerShares India Class seeks to provide a return that is similar to the return of one or more Invesco PowerShares ETFs that invest primarily in India."

5. Other than the Exemption Sought herein, the Top Fund will comply with NI 81-102 and relevant securities legislation.

6. There will be no duplication of management fees or incentive fees in the proposed structure, and the Manager of the Top Fund will ensure that there will be no sales fees other than nominal brokerage commissions and no redemption charges payable by the Top Fund in relation to its purchases or sales of securities of the PowerShares ETF.

7. The Top Fund will provide all disclosure mandated for mutual funds investing in other mutual funds.

The PowerShares ETF and the Mauritius Underlying Fund

8. The PowerShares ETF is a United States exchange-traded fund and is a security of PowerShares India Exchange-Traded Fund Trust (the **Trust**), a registered investment company in the U.S. Invesco PowerShares Capital Management LLC is the investment adviser of the Trust.

9. Securities of the PowerShares ETF are redeemable on demand, qualified for distribution in the United States by way of a prospectus dated February 27, 2009 and are traded on the NYSE Arca in the United States. The securities of the PowerShares ETF are index participation units as defined in NI 81-102.

10. The PowerShares ETF is not a reporting issuer in any of the Jurisdictions and, accordingly, is not governed by NI 81-102.

11. The investment objective of the PowerShares ETF is to seek investment results that correspond generally to the price and yield of the Indus India Index (the **India Index**).

12. The India Index is comprised of Indian equity securities traded on regulated stock exchanges in India and is designed to represent the Indian equity markets as a whole. The India Index has 50 constituents, spread among the following sectors: Information Technology, Health Sciences, Financial Services, Heavy Industry, Consumer Products and Other.

13. There are significant taxes and investment restrictions imposed by Indian regulatory authorities that are applicable to non-resident investors, such as the PowerShares ETF. These restrictions include withholding taxes and a per issuer aggregate investment restriction. In addition, there is a cumbersome registration regime for non-resident investors.

14. In order to permit investors in the PowerShares ETF to obtain broad exposure to India's capital markets in a tax-efficient manner, the Mauritius Underlying Fund has been created to serve exclusively as an investment vehicle for the PowerShares ETF.

15. The Mauritius Underlying Fund qualifies as an expert fund, established under the laws of Mauritius, holds a Category 1 Global Business licence issued by the Financial Services Commission of Mauritius (**FSC**) and is registered

with the Securities and Exchange Board of India (**SEBI**). The securities of the Mauritius Underlying Fund are redeemable on demand.

16. The principal investment strategy of the PowerShares ETF is to invest at least 90% of its assets in the Mauritius Underlying Fund which, in turn, invests at least 90% of its total assets in securities that comprise the India Index and American Depository Receipts (**ADRs**) based on the securities in the India Index. The PowerShares ETF anticipates that the majority of its investments will be in securities that comprise the India Index rather than ADRs.

17. As part of its investment strategy, the Mauritius Underlying Fund may invest its remaining assets in money market instruments, including repurchase agreements or other funds which invest exclusively in money market instruments, convertible securities, structured notes (notes on which the amount of principal repayment and interest payments are based on the movement of one or more specified factors, such as the movement of a particular security or securities index), and in swaps, options and futures contracts. Swaps, options and futures contracts (and convertible securities and structured notes) may be used by the Mauritius Underlying Fund in seeking performance that corresponds to the India Index and in managing cash flows.

18. The rules governing the investments of the Mauritius Underlying Fund address the same concerns as the investment restrictions on mutual funds in NI 81-102 by providing, among other things, the following restrictions:

    (a) on the ability of the Mauritius Underlying Fund to borrow;

    (b) on purchasing or selling physical commodities and real estate;

    (c) on selling securities short;

    (d) on purchasing securities on margin except in connection with the use of derivatives consistent with NI 81-102; and

    (e) on investing in illiquid securities if, as a result of such investment, more than 15% of the Mauritius Underlying Fund's net assets would be invested in illiquid securities.

19. The custodian of the Mauritius Underlying Fund is an arm's length third party, Brown Brothers Harriman & Co. (**BBH**). BBH has hired Hong Kong and Shanghai Banking Corporation China (**HSBC**), an arm's length third party entity, to act as sub-custodian in Mauritius and Citibank of India, Mumbai, also an arm's length third party entity, to act as sub-custodian in India.

20. The Manager will ensure that there is no duplication of management fees in the proposed structure, and that no sales fees, redemption charges or other fees will be payable by the PowerShares ETF in relation to its purchases or sales of securities of the Mauritius Underlying Fund.

21. By investing primarily in securities of the Mauritius Underlying Fund, the PowerShares ETF can gain broad exposure to India's capital markets in an efficient way, as withholding tax that would otherwise be applicable to the PowerShares ETF were it to invest directly in India is effectively eliminated due to a tax agreement between India and Mauritius. In addition, the PowerShares ETF will not be subject to a cumbersome registration regime.

22. As outlined above, the Top Fund may consistent with its investment objective, seek to gain exposure to India's capital markets through investments in the PowerShares ETF. Through the proposed structure, the PowerShares ETF will offer Canadian investors the opportunity to gain broad exposure to India's capital markets in a tax-efficient manner. Investing directly in securities in India is a less desirable option for the PowerShares ETF because of the adverse tax treatment and the investment restrictions and registration requirements that are associated with such direct investing.

Decision

The principal regulator is satisfied that the decision meets the test set out in the Legislation for the principal regulator to make the decision.

The decision of the principal regulator under the Legislation is that the Exemption Sought is granted provided that the decision shall only apply if, at the time the Top Fund makes or holds an investment in the PowerShares ETF, the following conditions are satisfied:

(a) the securities of the PowerShares ETF are index participation units as defined in NI 81-102;

(b) the PowerShares ETF invests substantially all of its assets in the Mauritius Underlying Fund;

(c) no duplication of management fees or incentive fees are payable by the Top Fund in relation to its purchases or sales of securities of the PowerShares ETF;

(d) no sales fees other than nominal brokerage commissions and no redemption charges are payable by the Top Fund in relation to its

purchases or sales of securities of the PowerShares ETF;

(e) no sales fees, redemption charges or other fees are payable by the PowerShares ETF in relation to its purchases or sales of securities of the Mauritius Underlying Fund;

(f) no duplication of management fees are payable by the PowerShares ETF in relation to its purchases or sales of securities of the Mauritius Underlying Fund; and

(g) the Mauritius Underlying Fund is subject to daily net asset value pricing substantially similar to that imposed under NI 81-106.

"Rhonda Goldberg"
Manager, Investment Funds Branch
Ontario Securities Commission

2.1.5 Suncor Energy Inc.

Headnote

National Policy 11-203 Process for Exemptive Relief Applications in Multiple Jurisdictions – Impracticable for Filer to prepare 51-101 reports for predecessor entity assets which were subject to exemptive relief permitting modified disclosure based on US oil and gas disclosure requirements – Modified annual oil and gas forms and reliance on US oil and gas disclosure requirements.

Applicable Legislative Provisions

National Instrument 51-101 Standards of Disclosure for Oil and Gas Activities.

Citation: Suncor Energy Inc., Re, 2009 ABASC 571

November 16, 2009

IN THE MATTER OF
THE SECURITIES LEGISLATION OF
ALBERTA AND ONTARIO
(the Jurisdictions)

AND

IN THE MATTER OF
THE PROCESS FOR EXEMPTIVE RELIEF
APPLICATIONS IN MULTIPLE JURISDICTIONS

AND

IN THE MATTER OF
SUNCOR ENERGY INC.
(the Filer)

DECISION

Background

The securities regulatory authority or regulator in each of the Jurisdictions (**Decision Maker**) has received an application from the Filer for a decision under the securities legislation of the Jurisdictions (the **Legislation**) that the Filer be exempted from the requirements contained in the Legislation to disclose information concerning oil and gas activities in accordance with the following sections of National Instrument 51-101 *Standards of Disclosure for Oil and Gas Activities* (**NI 51-101**):

(a) section 2.1;

(b) (i) sections 5.2(a)(iii) and (iv),

(ii) sections 5.2(b) and (c), and

(iii) section 5.3,

but only in respect of reserves as disclosed in accordance with US Disclosure Requirements defined below; and

(c) sections 5.8, 5.15(a), 5.15(b)(i) and 5.15(b)(iv);

including as those requirements pertain to prospectuses, annual information forms and other disclosure documents (collectively, the **Specified Canadian Disclosure Requirements**).

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a dual application):

(a) the Alberta Securities Commission is the principal regulator for this application,

(b) the Filer has provided notice that section 4.7(1) of Multilateral Instrument 11-102 *Passport System* (**MI 11-102**) is intended to be relied upon in each of the provinces and territories of Canada other than Ontario, and

(c) the decision is the decision of the principal regulator and evidences the decision of the securities regulatory authority or regulator in Ontario.

Interpretation

Unless otherwise defined, the terms herein have the meaning set out in National Instrument 14-101 *Definitions*, MI 11-102 and CSA Staff Notice 51-324 *Glossary to NI 51-101 Standards of Disclosure for Oil and Gas Activities*.

Representations

This decision is based on the following facts represented by the Filer:

1. The Filer's head and registered office is located in Calgary, Alberta.

2. The Filer is a reporting issuer or equivalent in each of the provinces and territories of Canada and is not in default of securities legislation in any such jurisdiction.

3. On August 1, 2009 predecessor Suncor Energy Inc. (**Suncor**) and Petro-Canada merged to form the Filer by way of plan of arrangement under the *Canada Business Corporations Act* (the **Merger**).

4. The Filer's plan to coordinate all major change initiatives and personnel and to ensure the organization is aligned, engaged and supported on a go-forward basis is expected to take an additional 12 months.

5. Prior to the Merger, Suncor and Petro-Canada received exemptions from certain requirements of NI 51-101 subject to certain conditions including, but not limited to, a condition that disclosure be provided that is consistent with the disclosure requirements relating to reserves and oil and gas activities under United States securities legislation (including disclosure requirements or guidelines issued or referenced by the SEC) as interpreted and applied by the SEC (the **US Disclosure Requirements**) pursuant to decision documents dated December 22, 2003 (the **Suncor Order**) and January 16, 2004 and November 11, 2008 (the **Petro-Canada Orders**).

6. Petro-Canada had approximately 4300 reserves entities, which are located in multiple jurisdictions including the United States, Canada, East Coast Canada, North Sea, North Latin America and North Africa (**Petro-Canada Reserves Entities**) compared to Suncor's 600 reserve entities, which are primarily Western Canada conventional, oilsands mining and oilsands in situ assets (**Suncor Reserves Entities**).

7. The Filer is currently engrossed in integration efforts including organization design, co-location of personnel and transitioning of information systems. Internal reserves evaluators assigned to Petro-Canada Reserves Entities may no longer be associated with the assets they evaluated for year-end 2008. As a result certain Petro-Canada Reserves Entities may have new internal evaluators, which would extend the time needed to evaluate the Petro-Canada Reserves Entities in accordance with NI 51-101.

8. Petro-Canada provided annual disclosure in accordance with the US Disclosure Requirements from year-end 2004 to year-end 2008 pursuant to the Petro-Canada Orders.

9. Given the extent of the integration efforts and the quantity of reserves data and other oil and gas information in respect of the Petro-Canada Reserves Entities, it is not practicable for the Filer to provide annual disclosure in accordance with NI 51-101 for the Petro-Canada Reserves Entities for the year-end December 31, 2009.

10. From year-end 2003 to year-end 2007, Suncor provided annual disclosure in accordance with the US Disclosure Requirements pursuant to the Suncor Order. The Filer will fully disclose and discuss in its annual disclosure documents any effect from the transition from NI 51-101 to the US Disclosure Requirements for the Suncor Reserves Entities for year-end 2009.

Decision

Each of the Decision Makers is satisfied that the decision meets the test set out in the Legislation for the Decision Maker to make the decision.

The decision of the Decision Makers under the Legislation is that:

1. the Filer is exempt from the Specified Canadian Disclosure Requirements provided that:

(a) **Annual Filings** – the Filer files with the securities regulatory authorities the following not later than the date on which it is required by the Legislation to file audited financial statements for its most recent financial year:

(i) a modified statement of reserves data and other oil and gas information relating to its oil and gas activities containing the information contemplated by, and consistent with, US Disclosure Requirements;

(ii) a modified report of qualified reserves evaluators in a form acceptable to the principal regulator; and

(iii) a modified report of management and directors on reserves data and other information in a form acceptable to the principal regulator;

(b) **Use of COGE Handbook** – the Filer's estimates of reserves and related future net revenue (or, where applicable, related standardized measure of discounted future net cash flows (the standardized measure)) are prepared or audited in accordance with the standards of the COGE Handbook modified to the extent necessary to reflect the terminology and standards of the US Disclosure Requirements;

(c) **Consistent Disclosure** – subject to changes in the US Disclosure Requirements and NI 51-101 and related policies, the Filer is consistent in its application of standards relating to oil and gas information and its disclosure of such information, within and between reporting periods, and without limiting the generality of the foregoing, in any disclosure made to the public, the Filer's estimates of reserves and related future net revenue (or, where applicable, related standardized measure) must be consistent with the reserves and related future net revenue (or, where applicable, related standardized measure) reported in its most recent filing with the Decision Maker;

(d) **Disclosure of this Decision and Effect** – the Filer

(i) files on SEDAR (either as a separate document or in its annual information form) a statement:

A. of the Filer’s reliance on this decision,

B. that explains generally the nature of the information that the Filer has disclosed or intends to disclose in the year in reliance on this decision and that identifies the standards and the source of the standards being applied (if not otherwise readily apparent), and

C. to the effect that the information that the Filer has disclosed or intends to disclose in the year in reliance on this decision may differ from the corresponding information prepared in accordance with NI 51-101 standards (if that is the case), and briefly describes the principal differences between the standards applied and the requirements of NI 51-101; and

(ii) includes, reasonably proximate to all other written disclosure that the Filer makes in reliance on this decision, a statement:

A. of the Filer's reliance on this decision,

B. that explains generally the nature of the information being disclosed and identifies the standards and the source of the standards being applied (if it is not otherwise readily apparent),

C. that the information disclosed may differ from the corresponding information prepared in accordance with NI 51-101 standards, and

D. that reiterates or incorporates by reference the disclosure referred to in paragraph 1(d)(i)(C)); and

(e) **Disclosure of Conflicting Independent Reports** – the Filer discloses and updates its public disclosure if, despite this decision, it obtains a final report on reserves data from an independent qualified reserves evaluator or auditor that contains information that is materially different from the Filer’s public disclosure record in respect of such reserves data; and

2. this decision will come into effect on December 28, 2009 and will terminate one year after the effective date.

“Blaine Young”
Associate Director, Corporate Finance

2.1.6 Canwel Building Materials Income Fund and Canwel Holding Partnership

Headnote

MI 11-102 and NP 11-203 – business combination – conversion of publicly traded income fund into corporate entity – MI 61-101 requires minority approval if conversion is a business combination – conversion is not a business combination for publicly traded fund, but is technically a business combination for a holding company in the fund's structure – relief granted to holding company from complying with the minority approval requirement, provided certain conditions met.

Applicable Legislative Provisions

Multilateral Instrument 61-101 Protection of Minority Security Holders in Special Transactions, ss. 4.5, 9.1.

December 17, 2009

IN THE MATTER OF
THE SECURITIES LEGISLATION OF
ONTARIO
(the Jurisdiction)

AND

IN THE MATTER OF
THE PROCESS FOR EXEMPTIVE RELIEF
APPLICATIONS IN MULTIPLE JURISDICTIONS

AND

IN THE MATTER OF
CANWEL BUILDING MATERIALS INCOME FUND
AND
CANWEL HOLDING PARTNERSHIP
(the Fund and the Partnership, respectively, and, together, the Filers)

DECISION

Background

The principal regulator in the Jurisdiction has received an application from the Filers for a decision under the securities legislation of the Jurisdiction (the Legislation) that the requirement set out in section 4.5 of Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions* (MI 61-101) that an issuer obtain minority approval for a business combination shall not apply to the Partnership with respect to the CanWel Conversion Transaction (as defined below) (the Exemption Sought).

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a passport application):

(a) the Ontario Securities Commission is the principal regulator for this application, and

(b) the Filers have provided notice that section 4.7(1) of Multilateral Instrument 11-102 *Passport System* (MI 11-102) is intended to be relied upon in Quebec.

Interpretation

Terms defined in National Instrument 14-101 *Definitions* and MI 11-102 have the same meaning if used in this decision, unless otherwise defined.

Representations

This decision is based on the following facts represented by the Filers:

1. The Fund is an unincorporated, open-ended limited purpose trust governed by the laws of the Province of Ontario. The Fund's head office is located at 302 – 369 Terminal Avenue, Vancouver, British Columbia V6A 4C4. The Fund was established pursuant to a declaration of trust dated April 5, 2005, as amended and restated on May 18, 2005 and May 8, 2008 in connection with the conversion of the former CanWel Building Materials Ltd. from a corporation to an income trust under a plan of arrangement effective May 18, 2005 (the 2005 Conversion).

2. The beneficial interests in the Fund are divided into interests of two classes, designated as "Trust Units" and "Special Voting Units". The Trust Units carry a right to receive any distributions from the Fund and an interest in any net assets of the Fund in the event of termination or winding-up of the Fund, while the Special Voting Units only entitle the holder thereof to one vote at all meetings of unitholders for each Special Voting Unit held. The holders of Trust Units and the holders of Special Voting Units are referred to collectively as "Voting Unitholders". The Trust Units are listed on the Toronto Stock Exchange under the trading symbol "CWX.UN".

3. The Partnership is a limited partnership established under the laws of the Province of Manitoba. The Partnership's head office is located at 302 – 369 Terminal Avenue, Vancouver, British Columbia V6A 4C4. The general partner of the Partnership is a corporation existing under the laws of the Province of Ontario named CanWel General Partner Inc. (CanWel GP), which is wholly-owned by the Fund. Most of the operating subsidiaries of the Fund are owned directly by the Partnership.

4. The Partnership has two classes of limited partnership interests: "Class A Partnership Units", all of which are held by CanWel Operating Trust (which is wholly owned by the Fund), and "Exchangeable Partnership Units". The Exchangeable Partnership Units are indirectly exchangeable into Trust Units and each Exchangeable Partner-

ship Unit is accompanied by a Special Voting Unit that entitles the holder to receive notice of, attend and to vote together with the holders of Trust Units at all meetings of Voting Unitholders. The Exchangeable Partnership Units were offered to the former CanWel Building Materials Ltd. shareholders as an alternative to receiving Trust Units in the 2005 Conversion, in order to permit such holders to achieve a "rollover"' for Canadian federal income tax purposes.

5. Pursuant to section 3.6(7) of National Policy 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions*, the Filers have identified the Ontario Securities Commission as their principal regulator for this application. While the head office of each of the Filers is located in the Province of British Columbia, the Filers are not seeking exemptive relief in British Columbia, as MI 61-101 has been adopted only in Ontario and Quebec. The Filers have determined that their most significant connection is to Ontario because there is a greater number of unitholders of the Fund located in Ontario as compared to Quebec.

6. Both the Fund and the Partnership are reporting issuers under applicable securities laws in Ontario and Quebec (and each of the other provinces of Canada). As an exchangeable security issuer, the Partnership is entitled, under Part 13 of National Instrument 51-102 *Continuous Disclosure Obligations* (NI 51-102) and related provisions of securities laws, to an exemption from the financial statement and other continuous disclosure requirements of NI 51-102 and certain related requirements of securities laws.

7. The Filers are not in default of applicable securities legislation in any of the jurisdictions of Canada.

8. As at November 30, 2009, there were 24,031,538 Trust Units and 11,144,279 Exchangeable Partnership Units outstanding. All of the outstanding Exchangeable Partnership Units are owned, directly or indirectly, by Amar Doman who serves as Chairman and as a Trustee of the Fund, and as Chairman and as a Director of CanWel GP.

9. The Exchangeable Partnership Units are not listed on any exchange and, by their terms, are not transferable except upon their exchange for Trust Units and in certain other very limited circumstances.

10. The Exchangeable Partnership Units are intended to be, to the greatest extent practicable, the economic equivalent of Trust Units. Holders of Exchangeable Partnership Units are entitled to receive distributions paid by the Partnership, which distributions will be equal, to the greatest extent practicable, to distributions paid by the Fund to holders of Trust Units. Each accompanying Special Voting Unit entitles the holder to one vote at all meetings of unitholders of the Fund. Pursuant to the limited partnership agreement of the Partnership, the holders of Exchangeable Partnership Units do not have voting rights in respect of matters to be decided by the limited partners of the Partnership.

11. The Fund is now proposing to undertake a transaction that would result in the conversion of the Fund and the Partnership to a corporate structure (the CanWel Conversion Transaction). Under the CanWel Conversion Transaction, the holders of Trust Units and Exchangeable Partnership Units will, if the transaction is approved by Voting Unitholders and certain other conditions are satisfied or waived, exchange their respective units for common shares of a new corporation (New CanWel) established by the Fund. Upon completion of the CanWel Conversion Transaction, New CanWel will become the successor reporting issuer to the Fund, and it is intended that the New CanWel common shares will be listed on the Toronto Stock Exchange.

12. The CanWel Conversion Transaction will be effected by a plan of arrangement under the *Business Corporations Act* (British Columbia), subject to approval at a meeting of Voting Unitholders by a special resolution approved by no less than two-thirds of the votes cast by holders of Trust Units and Special Voting Units, voting together as a single class as provided in the Fund's declaration of trust. The CanWel Conversion Transaction is also subject to approval by the British Columbia Supreme Court.

13. Under the CanWel Conversion Transaction, all holders of Trust Units and holders of Exchangeable Partnership Units will receive the same consideration in return for their respective units, namely one common share of New CanWel for each Trust Unit or Exchangeable Partnership Unit held.

14. In addition to the CanWel Conversion Transaction, the Fund also announced in its press release dated December 7, 2009 (i) a proposed acquisition (the Proposed Acquisition) by New CanWel of all of the issued and outstanding shares in the capital of Broadleaf Logistics Company; and (ii) a "bought deal" private placement of subscription receipts by the Fund (the Proposed Private Placement and, collectively with the CanWel Conversion Transaction and the Proposed Acquisition, the Proposed Transactions). The Proposed Transactions constitute "connected transactions" under MI 61-101.

15. The CanWel Conversion Transaction will not be a business combination, as defined in MI 61-101, for

the Fund because it is a downstream transaction (as defined in MI 61-101) for the Fund and, as such, there is no requirement for the Fund to obtain a formal valuation or minority approval under MI 61-101 for the CanWel Conversion Transaction.

16. The Proposed Acquisition is not a "related party transaction" under MI 61-101. One of the subscriptions for subscription receipts of the Fund under the Proposed Private Placement will constitute a "related party transaction" under MI 61-101 for the Fund because the subscriber is an independent trustee of the Fund. There is no requirement for the Fund to obtain a formal valuation or minority approval under Part 5 of MI 61-101 for this subscription under the Proposed Private Placement because neither the fair market value of the subscription receipts to be issued in connection with, nor the fair market value of the consideration for, such subscription, insofar as it involves the independent trustee, exceeds 25% of the Fund's market capitalization.

17. The CanWel Conversion Transaction would be considered a business combination, as defined in MI 61-101, for the Partnership because (i) the CanWel Conversion Transaction would not be a downstream transaction (as defined in MI 61-101) for the Partnership and would result in a related party of the Partnership (New CanWel), directly or indirectly, acquiring the issuer (the Partnership); and (ii) certain related parties of the Partnership (including the Fund and New CanWel) are party to the Proposed Acquisition and the Proposed Private Placement which are connected transactions to the CanWel Conversion Transaction.

18. For the Partnership, the CanWel Conversion Transaction would be exempt from the formal valuation requirements of Part 4 of MI 61-101, pursuant to section 4.4(a), since no securities of the Partnership are listed on the specified markets. However, the CanWel Conversion Transaction would subject the Partnership to the requirement to obtain minority approval for the CanWel Conversion Transaction from the holders of "affected securities" of the Partnership; that is, the holders of Exchangeable Partnership Units, although no minority approval requirement would apply at the Fund level.

Decision

The principal regulator is satisfied that the decision meets the test set out in the Legislation for the principal regulator to make the decision.

The decision of the principal regulator under the Legislation is that the Exemption Sought is granted, provided that the condition in subsection (e)(iii) of the definition of business combination in section 1.1 of MI 61-101 is met.

Furthermore, the decision of the principal regulator is that the application of the Filers and this decision be kept confidential and not be made public until the earlier of: (a) the date on which the Fund mails the management information circular to unitholders of the Fund in connection with unitholder approval of the CanWel Conversion Transaction; (b) the date the Fund advises the principal regulator that there is no longer any need for the application and this decision to remain confidential; and (c) the date that is 90 days after the date of this decision.

"Naizam Kanji"
Deputy Director, Corporate Finance
Ontario Securities Commission

2.1.7 Toromont Industries Ltd.

Headnote

Multilateral Instrument 11-102 Passport System and National Policy 11-203 Process for Exemptive Relief Applications in Multiple Jurisdictions – Take-over Bids – Identical consideration – Issuer needs relief from the requirement in subsection 97(1) of the Securities Act (Ontario) and section 2.23 of Multilateral Instrument 62-104 Take-Over Bids and Issuer Bids that all holders of the same class of securities must be offered identical consideration – Under the bid, Canadian resident security holders will receive shares of the offeror; security holders who are residents of the U.S. will receive substantially the same value as Canadian security holders in the form of cash paid to such security holders based on the proceeds from the sale of their shares.

Applicable Legislative Provisions

Securities Act, R.S.O. 1990, c. S.5, as am., ss. 97(1), 104(2)(c).

November 12, 2009

IN THE MATTER OF
THE SECURITIES LEGISLATION OF
ALBERTA AND ONTARIO
(the Jurisdictions)

AND

IN THE MATTER OF
THE PROCESS FOR EXEMPTIVE RELIEF
APPLICATIONS IN MULTIPLE JURISDICTIONS

AND

IN THE MATTER OF
TOROMONT INDUSTRIES LTD.
(the Filer)

DECISION

Background

The securities regulatory authority or regulator in each of the Jurisdictions (the **Decision Maker**) has received an application from the Filer for a decision under the securities legislation of the Jurisdictions (the **Legislation**) exempting the Filer from subsection 2.23(1) of Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids* (**MI 62-104**) and subsection 97(1) of the *Securities Act* (Ontario) (the **Identical Consideration Requirement**), which require the Filer to offer identical consideration to all of the holders of the same classes of securities that are subject to a take-over bid in connection with the Filer's offer (the **Offer**) to acquire all of the issued and outstanding trust units (**Trust Units**) of Enerflex Systems Income Fund (**Enerflex**) and all of the issued and outstanding class B limited partnership units (**Exchangeable LP Units** and, together with the Trust Units, the **Units**) of Enerflex Holdings Limited Partnership (**Enerflex LP**) (the **Exemption Sought**).

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a dual application):

(a) the Alberta Securities Commission is the principal regulator for this application;

(b) the Filer has provided notice that subsection 4.7(1) of Multilateral Instrument 11-102 *Passport System* (**MI 11-102**) is intended to be relied upon in British Columbia, Saskatchewan, Manitoba, Québec, Nova Scotia, New Brunswick, Newfoundland and Labrador, Prince Edward Island, the Northwest Territories, Nunavut and Yukon; and

(c) the decision is the decision of the principal regulator and evidences the decision of the securities regulatory authority or regulator in Ontario.

Interpretation

Terms defined in National Instrument 14-101 *Definitions* and MI 11-102 have the same meaning if used in this decision, unless otherwise defined.

Representations

The decision is based on the following facts represented by the Filer:

1. The Filer is a corporation existing under the *Canada Business Corporations Act* and its registered and head office is located in Concord, Ontario.

2. The Filer is a reporting issuer in British Columbia, Alberta, Saskatchewan, Manitoba, Ontario, Québec, New Brunswick, Nova Scotia and Prince Edward Island and is not in default of any of the requirements of securities legislation applicable to it.

3. The authorized share capital of the Filer consists of an unlimited number of common shares (the **Filer Shares**) and an unlimited number of preferred shares. As at October 26, 2009, there were 64,731,937 Filer Shares issued and outstanding and no preferred shares were issued and outstanding.

4. The Filer Shares are listed and posted for trading on the Toronto Stock Exchange (the **TSX**).

5. Enerflex is an open-ended mutual fund trust governed by the laws of the Province of Alberta pursuant to a Deed of Trust dated August 22, 2006 and its head office is located in Calgary, Alberta.

6. Enerflex is a reporting issuer in each of the provinces and territories of Canada.

7. The authorized capital of Enerflex consists of an unlimited number of Trust Units and an unlimited number of special voting units. As at November 1, 2009, there were 44,281,622 Trust Units issued and outstanding and one special voting unit issued and outstanding.

8. The Trust Units are listed and posted for trading on the TSX.

9. Enerflex LP, an indirect subsidiary of Enerflex, is a limited partnership formed under the laws of the Province of Alberta pursuant to a limited partnership agreement dated August 23, 2006. Enerflex LP's head office is located in Calgary, Alberta.

10. Enerflex LP is a reporting issuer in British Columbia, Alberta, Saskatchewan, Québec and Nova Scotia.

11. The authorized capital of Enerflex LP consists of an unlimited number of class A limited partnership units, all of which are held indirectly by Enerflex, and an unlimited number of Exchangeable LP Units. The Exchangeable LP Units are exchangeable for Trust Units on a one-for-one basis. As at November 1, 2009, there were 2,663,422 Exchangeable LP Units issued and outstanding.

12. On October 16, 2009, the Filer publicly announced that it had made a proposal to Enerflex to enter into a business combination transaction whereby the holders of Units would receive cash and Filer Shares representing total consideration of $13.50 per Unit, with at least 50% of the consideration comprised of cash and the balance in Filer Shares.

13. The Filer and Enerflex were not able to successfully negotiate a business combination transaction, and on November 12, 2009, the Filer announced its intention to proceed with the Offer.

14. As consideration for each Unit, the Filer will offer pursuant to the Offer, at the option of the holders of Units, either (i) $13.50 cash or (ii) $0.05 cash plus 0.5098 Filer Shares, subject in each case to pro ration. The maximum amount of cash payable by the Filer pursuant to the Offer will be 50% of the total consideration, and the balance will be payable in Filer Shares.

15. Rule 802 (**Rule 802**) under the United States (**US**) *Securities Act of 1933* (the **1933 Act**), provides an exemption from the registration requirements of the 1933 Act for offers and sales in any exchange offer for a class of securities of a "foreign private issuer" (as defined for purposes of the 1933 Act and the rules and regulations issued by the US Securities and Exchange Commission thereunder) or in any exchange of securities for the securities of a foreign private issuer in any business combination if the holders of the foreign subject company resident in the US hold no more than 10% of the securities that are the subject of the exchange offer or business combination and the other conditions of Rule 802 are satisfied. Rule 802 and the related rules provide that, for the purposes of this calculation, securities held by the offeror are to be excluded. Rule 802 and the related rules also provide that, in the context of a non-consensual exchange offer or proposed business combination transaction, the subject company will be presumed to be a "foreign private issuer" and US holders will be presumed to hold 10% or less of its outstanding subject securities unless (a) the average daily trading volume of the subject securities in the US exceeds 10% of the average daily trading volume of the subject securities on a worldwide basis for the period specified in the rules, (b) the most recent annual report filed by the subject company indicates that US holders hold more than 10% of the outstanding subject securities, or (c) the offeror knows or has reason to know, before the public announcement of the offer, that the level of US ownership exceeds 10% of such securities.

16. The average daily trading volume of the Trust Units in the US for the specified period did not exceed 10% of the average daily trading volume for the Trust Units on a worldwide basis for the specified period. Furthermore, Enerflex has not disclosed in its most recent annual information form that holders of Units in the US (**US Unitholders**) collectively hold more than 10% of the Trust Units or the Exchangeable LP Units, and the Filer did not know or have reason to know, before the public announcement of its proposal on October 16, 2009, that the level of US ownership of the Trust Units or the Exchangeable LP Units exceeds 10% of such securities. Accordingly, the Filer is entitled to rely on the presumption under Rule 802 and the related rules that Enerflex and Enerflex LP are "foreign private issuers" and that holders of Units in the US do not hold more than 10% of the Trust Units or Exchangeable LP Units. The Filer will satisfy the other requirements of Rule 802. Accordingly, the offer and sale of the Filer Shares in the Offer will be exempt from the registration requirements of the 1933 Act.

17. Because: (a) the Trust Units are not listed on a US stock exchange; (b) the Trust Units are not a registered class of securities under applicable US federal securities laws; and (c) Enerflex is structured as a Canadian "income trust", the Filer has reason to believe that the level of US ownership of Units is low.

18. In order for the exemption provided in Rule 802 to apply, holders resident in the US must be permitted to participate in the exchange offer or business combination on terms at least as favourable to those offered to the other holders of the subject securities, subject to an exception which allows the offeror to offer cash consideration (in lieu of the offered securities) to securityholders resident in states of the US that require registration or qualification of the offered securities under applicable state or local securities laws.

19. There is no general exemption from US state "blue sky" securities laws that corresponds with Rule 802. As a result, the securities laws of a significant number of US states would prohibit delivery of the Filer Shares to US Unitholders without registration of the Filer Shares to be issued to US Unitholders resident in such states unless such holders are otherwise exempt investors under the laws of such states.

20. Registration under applicable state securities laws of the Filer Shares deliverable to US Unitholders would be costly and burdensome to the Filer.

21. The Exemption Sought relates to those US Unitholders that do not qualify as exempt "institutional investors" within the meaning of the securities laws and regulations of such US Unitholders' US jurisdiction (the **Ineligible US Unitholders**).

22. The Filer Shares issuable under the Offer have not been and will not be registered under the 1933 Act or qualified under any US state "blue sky" securities laws. The offer or sale of Filer Shares under the Offer to Ineligible US Unitholders would violate certain US state securities laws.

23. The Filer proposes, with respect to Ineligible US Unitholders that would otherwise receive Filer Shares in exchange for their Units under the Offer, to, at the sole discretion of the Filer, have such Filer Shares issued on their behalf to a selling agent, which shall, as agent for such Ineligible US Unitholders, as expeditiously as is commercially reasonable thereafter, sell such Filer Shares on their behalf through the facilities of the TSX and have the net proceeds of such sale, less any applicable brokerage commissions, other expenses and withholding taxes, delivered to such Ineligible US Unitholders. Each Ineligible US Unitholder for whom Filer Shares are sold by the selling agent will receive an amount equal to such Unitholder's pro rata interest in the net proceeds of sales of all Filer Shares so sold by the selling agent.

24. Any sale of the Filer Shares described above will be completed as expeditiously as commercially reasonable after the date on which the Filer takes up and pays for the Units tendered by the Ineligible US Unitholders under the Offer and will be done in a manner intended to maximize the consideration to be received from the sale and minimize any adverse impact of the sale on the market for the Filer Shares.

25. The Offer to Ineligible US Unitholders and the sale of the Filer Shares for the benefit of Ineligible US Unitholders in accordance with the procedure set out in paragraphs 23 and 24 (the **Vendor Placement**) will not violate any applicable US federal or state securities laws.

26. The take-over bid circular to be prepared by the Filer and mailed to all holders of Units in connection with the Offer will disclose the Vendor Placement.

27. There is currently a "liquid market", as that term is defined in Section 1.2 of Multilateral Instrument 61-101 *Protection of Minority Security Holders in Special Transactions*, for the Filer Shares and the Filer's financial advisor has advised that in its view there will continue to be such a "liquid market" for the Filer Shares following completion of the Offer, any related second-step transaction, and the Vendor Placement.

28. If the Filer increases the consideration offered to holders of Units resident in Canada, the increase in consideration will also be offered to holders of Units resident outside of Canada, including Ineligible US Unitholders, at the same time and on the same basis.

29. Except to the extent that discretionary exemptive relief from applicable securities legislation is granted by securities regulatory authorities or securities regulators, the Offer will be made in compliance with the requirements under the Legislation governing take-over bids.

Decision

Each of the Decision Makers is satisfied that the decision meets the tests set out in the Legislation for the Decision Maker to make the decision.

The decision of the Decision Makers under the Legislation is that the Exemption Sought is granted so that the Filer is exempt from the Identical Consideration Requirement, provided that Ineligible US Unitholders that would otherwise receive Filer Shares under the Offer instead receive cash proceeds from the sale of those Filer Shares in accordance with the Vendor Placement.

"William S. Rice, QC"
Commissioner
Alberta Securities Commission

"Stephen R. Murison"
Commissioner
Alberta Securities Commission

2.1.8 Western Canadian Coal Corp.

Headnote

National Policy 11-203 Process for Exemptive Relief Applications in Multiple Jurisdictions – An issuer wants relief from the requirement to audit acquisition statements in accordance with Canadian or U.S. GAAS – The issuer acquired a business whose historical financial statements have not been audited in accordance with Canadian or U.S. GAAS – The acquired business' financial statements have been audited in accordance with International Standards on Auditing – For various reasons, it would be practically impossible to re-audit the business' financial statements in accordance with Canadian or U.S. GAAS – The audit report will be accompanied by a statement by the auditor that describes any material differences in the form of report as compared to a Canadian GAAS audit report, and indicates that its report would not contain a reservation if it were prepared in accordance with Canadian GAAS.

Applicable Legislative Provisions

National Instrument 52-107 Acceptable Accounting Principles, Auditing Standards and Reporting Currency, ss. 6.2, 9.1.

September 24, 2009

IN THE MATTER OF
THE SECURITIES LEGISLATION OF
BRITISH COLUMBIA AND ONTARIO
(the Jurisdictions)

AND

IN THE MATTER OF
THE PROCESS FOR EXEMPTIVE RELIEF
APPLICATIONS IN MULTIPLE JURISDICTIONS

AND

IN THE MATTER OF
WESTERN CANADIAN COAL CORP.
(the Filer)

DECISION

Background

1 The securities regulatory authority or regulator in each of the Jurisdictions (Decision Maker) has received an application from the Filer for a decision under the securities legislation of the Jurisdictions (the Legislation) that the Filer be exempted from complying with section 6.2 of National Instrument 52-107, *Acceptable Accounting Principles, Auditing Standards and Reporting Currency* (NI 52-107), pursuant to which the financial statements of an acquired company that are included in a business acquisition report filed under section 8.2 of National Instrument 51-102, *Continuous Disclosure Obligations* must be audited in accordance with Canadian or United States generally accepted auditing standards (the Requested Relief).

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a dual application):

(a) the British Columbia Securities Commission is the principal regulator for this application;

(b) the Filer has provided notice that section 4.7(1) of Multilateral Instrument 11-102 – *Passport System* (MI 11-102) is intended to be relied upon in Alberta, Saskatchewan, Manitoba, New Brunswick, Nova Scotia, Newfoundland and Labrador and Prince Edward Island; and

(c) the decision is the decision of the principal regulator and evidences the decision of the other securities regulatory authority or regulator in Ontario.

Interpretation

2 Terms defined in National Instrument 14-101 *Definitions* have the same meaning as is used in this decision, unless otherwise defined.

Representations

3 This decision is based on the following facts represented by the Filer:

1. the Filer is a company incorporated under the laws of British Columbia;

2. the Filer's registered office is located at 1600 – 925 West Georgia Street, Vancouver, British Columbia V6C 3L2 and its head office is located at 900-580 Hornby Street, Vancouver, British Columbia, V6C 3B6;

3. the Filer's primary business is acquiring, exploring and developing coal mining properties for the international metallurgical coal markets, with a current focus on coal mining in northeastern British Columbia, West Virginia and Wales;

4. the Filer is a reporting issuer each of the provinces of Canada, except Québec, and is not in default of its reporting issuer obligations in any jurisdiction;

5. the Filer's common shares are listed on the Toronto Stock Exchange (TSX) and the Alternative Investment Market of the London Stock Exchange (AIM) under the symbol "WTN"; certain share purchase warrants and convertible debentures of the Filer are also listed on the TSX under the symbol "WTN.WT" and "WTN.DB", respectively;

6. as disclosed in a press release dated May 20, 2009 and a material change report dated May 26, 2009, the Filer and Cambrian Mining plc (Cambrian) entered into a combination agreement, pursuant to which the Filer agreed to acquire all of the issued and outstanding ordinary shares of Cambrian (the Combination);

7. as disclosed in a press release dated July 13, 2009 and a material change report dated July 23, 2009, the Combination was completed on July 13, 2009 and the Filer became the sole beneficial holder of all of the ordinary shares of Cambrian; in connection with the Combination, the name of Cambrian was changed from Cambrian Mining plc to Cambrian Mining Limited;

8. Cambrian is a corporation incorporated under the laws of the United Kingdom. Cambrian's registered office is located at 27 Albemarle Street, London W1S 4DW United Kingdom;

9. prior to the Combination, Cambrian was a public company in the United Kingdom whose shares were admitted to trading on AIM under the symbol "CBM";

10. the financial statements of Cambrian have been prepared in accordance with International Financial Reporting Standards and audited in accordance with International Standards on Accounting (ISA);

11. the Combination was a "significant acquisition" for the Filer, within the meaning of section 8.3 of National Instrument 51-102, *Continuous Disclosure Obligations* (NI 51-102), for which the Filer is required to file a business acquisition report (BAR) in accordance with section 8.2 of NI 51-102;

12. pursuant to section 8.4 of NI 51-102, audited financial statements of Cambrian for the financial year ended June 30, 2009 (the Audited Financial Statements) are required to be included in the BAR; the Audited Financial Statements will include a reconciliation note prepared in accordance with the requirements of section 6.1 of NI 52-107;

13. section 6.2 of NI 52-107 does not permit the Filer to file the Audited Financial Statements audited in accordance with ISA as the Filer is not a "foreign issuer" within the meaning of NI 52-107;

14. as announced by the Canadian Institute of Chartered Accountants, the Canadian Auditing and Assurance Standards Board is adopting ISA as Canadian Auditing Standards (CAS) for the audits of financial statements; once effective, the CAS will constitute Canadian generally accepted auditing standards for financial statement audits; the CAS will come into effect for audits of financial statements for periods ending on or after December 14, 2010;

15. the Audited Financial Statements have been prepared in accordance with International Financial Reporting Standards and audited in accordance with ISA pursuant to requirements governing publicly-traded companies in the United Kingdom, including the requirements of AIM;

16. having the Audited Financial Statements audited a second time in accordance with Canadian GAAS would cause the Filer to incur substantial additional costs and management time and potentially cause a material delay in the filing of its BAR in respect of the Combination.

Decision

4 Each of the Decision Makers is satisfied that the decision meets the test set out in the Legislation for the Decision Maker to make the decision.

The decision of the Decision Makers under the Legislation is that the Requested Relief is granted provided that the Audited Financial Statements:

(a) are audited in accordance with ISA; and

(b) are accompanied by an auditor's report from the auditor of Cambrian that contains, or is accompanied by, a statement by the auditor that:

(i) describes any material differences in the form and content of the auditor's report as compared to an auditor's report prepared in accordance with Canadian GAAS; and

(ii) indicates that an auditor's report prepared in accordance with Canadian GAAS would not contain a reservation.

"Andrew S. Richardson, CA"
Acting Director, Corporate Finance
British Columbia Securities Commission

2.1.9 EPCOR Power Equity Ltd. and EPCOR Power L.P.

Headnote

National Policy 11-203 Process for Exemptive Relief Applications in Multiple Jurisdictions – exemption granted from the continuous disclosure, certification, insider reporting, audit committee and corporate governance requirements. Issuer meets the conditions of section 13.4 of NI 51-102, except the issuer proposes to issue convertible preferred shares that are convertible into other preferred shares of the issuer.

Applicable Legislative Provisions

National Instrument 51-102 Continuous Disclosure Requirements.
National Instrument 52-109 Certification of Disclosure in Issuers' Annual and Interim Filings.
National Instrument 52-110 Audit Committees.
National Instrument 58-101 Disclosure of Corporate Governance Practices.
National Instrument 55-102 System for Electronic Disclosure by Insiders.
National Instrument 44-101 Short Form Prospectus Distributions

Citation: EPCOR Power Equity Ltd., EPCOR Power Equity L.P., Re, 2009 ABASC 492

October 9, 2009

IN THE MATTER OF
THE SECURITIES LEGISLATION OF
ALBERTA AND ONTARIO
(the Jurisdictions)

AND

IN THE MATTER OF
THE PROCESS FOR EXEMPTIVE RELIEF
APPLICATIONS IN MULTIPLE JURISDICTIONS

AND

IN THE MATTER OF
EPCOR POWER EQUITY LTD. (the Issuer) AND
EPCOR POWER L.P.
(the Partnership and together with the Issuer,
the Filers)

DECISION

Background

The securities regulatory authority or regulator in each of the Jurisdictions (**Decision Maker**) has received an application from the Filers for a decision under the securities legislation of the Jurisdictions (the **Legislation**) granting the Issuer or its insiders, as the case may be, relief from the following:

(a) the continuous disclosure requirements contained in the Legislation, including requirements under National Instrument 51-102 *Continuous Disclosure Obligations* (**NI 51-102**), as amended from time to time (the **Continuous Disclosure Requirements**);

(b) the certification requirements contained in National Instrument 52-109 *Certification of Disclosure in Issuers' Annual and Interim Filings* (**NI 52-109**), as amended from time to time (the **Certification Requirements**);

(c) the insider reporting requirements contained in the Legislation and the requirement to file an insider profile and insider reports under National Instrument 55-102 *System for Electronic Disclosure by Insiders* (**NI 55-102**), as amended from time to time, in respect of insiders of the Issuer (the **Insider Reporting Requirements**);

(d) the requirements of the Legislation relating to audit committees, including, without limitation, National Instrument 52-110 *Audit Committees* (**NI 52-110**), as amended from time to time (the **Audit Committee Requirements**);

(e) the corporate governance disclosure requirements contained in National Instrument 58-101 *Disclosure of Corporate Governance Practices* (**NI 58-101**), as amended from time to time (the **Corporate Governance Requirements**); and

(f) the requirement in Section 2.4 of National Instrument 44-101 *Short Form Prospectus Distributions* (**NI 44-101**), as amended from time to time, that preferred shares be non-convertible in order for the Issuer to be qualified to file a short form prospectus in respect of a distribution of such shares (the **Short Form Prospectus Eligibility Requirement**).

The Decision Maker has received an application from the Filers for a decision under the Legislation that the application for this decision and this decision (collectively, the **Confidential Material**) be kept confidential pursuant to Section 5.4 of National Policy 11-203 *Process for Exemptive Relief Applications in Multiple Jurisdictions* (**NP 11-203**), as amended from time to time until the earlier of: (i) the date on which the Issuer is issued a receipt for the preliminary short form prospectus in respect of the distribution of the Series 2 Shares; (ii) the date that the Issuer advises the Decision Makers that there is no longer any need for the Confidential Material to remain confidential; and (iii) the date that is 90 days after the date of this decision (the **Request for Confidentiality**).

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a dual application):

(a) the Alberta Securities Commission is the principal regulator for this application,

(b) the Filers have provided notice that section 4.7(1) of Multilateral Instrument 11-102 *Passport System* (**MI 11-102**) is intended to be relied upon in British Columbia, Saskatchewan, Manitoba, Québec, New Brunswick, Nova Scotia, Newfoundland & Labrador, Prince Edward Island, Yukon Territory, Northwest Territories and Nunavut, and

(c) the decision is the decision of the principal regulator and evidences the decision of the securities regulatory authority or regulator in Ontario.

Interpretation

Terms defined in National Instrument 14-101 *Definitions* and MI 11-102 have the same meanings if used in this decision, unless otherwise defined.

Representations

This decision is based on the following facts represented by the Filers:

The Issuer

1. The Issuer was incorporated under the laws of the Province of Alberta on June 26, 1998.

2. The head office and principal place of business of the Issuer is located in Edmonton, Alberta.

3. The Issuer is a reporting issuer, or the equivalent, in each of the Jurisdictions, and to its knowledge is not in default of any requirements under the Legislation.

4. The Issuer operates as a holding company and indirectly holds all of the Partnership's business and power generation and other assets in the United States.

5. The authorized share capital of the Issuer currently consists of an unlimited number of Class A common shares (the **Common Shares**) and an unlimited number of cumulative redeemable preferred shares (the **Preferred Shares**), issuable in series, of which up to 5,750,000 Cumulative Redeemable Preferred Shares, Series 1 (the **Series 1 Shares**) have been authorized for issuance. As of September 18, 2009, there were a number of Common Shares outstanding and 5,000,000 Series 1 Shares outstanding.

6. The only voting securities of the Issuer are the Common Shares, all of which are beneficially owned by the Partnership.

7. The Preferred Shares may at any time and from time to time be issued in one or more series having such rights, restrictions and privileges determined by the directors of the Issuer. Subject to any rights which may be attached to a series of Preferred Shares and applicable law, the holders of Preferred Shares shall not be entitled to vote at any meeting of shareholders of the Issuer.

8. The Partnership has provided a full and unconditional guarantee of the payments to be made by the Issuer, as stipulated in the terms of the Series 1 Shares, which results in the holders of such securities being entitled to receive

payment from the Partnership within 15 days of any failure by the Issuer to make a payment, as contemplated by paragraph (d) of the definition of "designated credit support security" in NI 51-102.

9. The Issuer has not issued any securities, and does not have any securities outstanding, other than the Series 1 Shares, which are "designated credit support securities" (as defined in NI 51-102), the Common Shares, which were issued to and are held by the Partnership as "parent credit supporter" (as defined in NI 51-102), and other securities described in Section 13.4(2)(c)(ii), (iii) and (iv) of NI 51-102.

10. The Issuer is a "credit support issuer" (as defined in NI 51-102) and currently satisfies the requirements of NI 51-102 by relying on Section 13.4(2) of NI 51-102, and subject to that Section has filed all documents it is required to file under NI 51-102.

11. The Issuer has relied on Section 13.4(2) to satisfy the requirements of NI 51-102 and as such, has also relied on Section 8.5 of NI 52-109 in respect of the Certification Requirements, Section 1.2(g) of NI 52-110 in respect of the Audit Committee Requirements and Section 1.3(d) of NI 58-101 in respect of the Corporate Governance Requirements, insiders of the Issuer have relied on Section 13.4(3) of NI 51-102 in respect of the Insider Reporting Requirements, and, in connection with the issuance of the Series 1 Shares, the Issuer relied on Section 2.4 of NI 44-101 in respect of the Short Form Prospectus Eligibility Requirement.

12. The Issuer is proposing to amend its articles to create two new series of Preferred Shares, being Cumulative Rate Reset Preferred Shares, Series 2 (the **Series 2 Shares**) and Cumulative Floating Rate Preferred Shares, Series 3 (the **Series 3 Shares**).

13. The Partnership will provide a full and unconditional guarantee of the payments to be made by the Issuer, as stipulated in the terms of the Series 2 Shares and the Series 3 Shares, which will result in the holders of such securities being entitled to receive payment from the Partnership within 15 days of any failure by the Issuer to make a payment, as contemplated by paragraph (d) of the definition of "designated credit support security" in NI 51-102.

14. The Series 2 Shares will be convertible, in certain circumstances at the option of the holder or the Issuer, into an equal number of Series 3 Shares, therefore, the Series 2 Shares will not be "designated credit support securities" (as defined in NI 51-102).

15. The Series 3 Shares will be convertible, in certain circumstances at the option of the holder or the Issuer, into an equal number of Series 2 Shares, therefore, the Series 3 Shares will not be "designated credit support securities" (as defined in NI 51-102).

16. The Issuer is proposing to distribute the Series 2 Shares to the public pursuant to a short form prospectus filed in each of the Jurisdictions. The short form prospectus will be prepared pursuant to the short form procedures contained in NI 44-101 and will comply with the requirements set out in Form 44-101F1, including Item 12 of Form 44-101F1.

17. An application will be made to list the Series 2 Shares and the Series 3 Shares on the TSX.

18. The Issuer may also, subject to market conditions, desire to issue other series of Preferred Shares that, but for the fact they would be convertible to other series of Preferred Shares, would satisfy the definition of "designated credit support securities" in NI 51-102.

The Partnership

19. The Partnership is a limited partnership organized under the laws of the Province of Ontario pursuant to a limited partnership agreement (the **Partnership Agreement**) made as of March 27, 1997 as amended and restated June 6, 1997 and as amended September 29, 1998, March 26, 2004 and April 29, 2004 and as amended and restated August 31, 2005 and July 1, 2009, among EPCOR Power Services Ltd., as general partner, the initial limited partner and each person who is admitted to the Partnership as a limited partner.

20. The head office and principal place of business of the Partnership is located in Edmonton, Alberta.

21. The Partnership is a reporting issuer, or the equivalent, in each of the Jurisdictions, and to its knowledge is not in default of any requirements under the Legislation.

22. The Partnership carries on activities that are directly or indirectly related to the energy supply industry and holds investments in other entities which are primarily engaged in such industry.

23. The Partnership is a "parent credit supporter" (as defined in NI 51-102) of the Issuer and has filed all documents it is required to file under NI 51-102.

24. The Partnership is qualified to file a prospectus in the form of a short form prospectus pursuant to Section 2.2 of NI 44-101, as it satisfies paragraphs (a), (b), (c), (d) and (e) of that Section.

25. The limited partnership units of the Partnership (the **Units**) trade on the TSX under the symbol "EP.UN". As at September 18, 2009, the Partnership had 53,897,279 Units outstanding.

Decision

Each of the Decision Makers is satisfied that the decision meets the test set out in the Legislation for the Decision Makers to make the decision.

Relief from the Continuous Disclosure Requirements

The decision of the Decision Makers under the Legislation is that relief from the Continuous Disclosure Requirements is granted, provided that:

(a) the Issuer continues to satisfy all the conditions set forth in subsection 13.4(2) of NI 51-102, other than paragraph 13.4(2)(c); and

(b) the Issuer does not issue any securities, and does not have any securities outstanding, other than:

(i) designated credit support securities (as such term is defined in NI 51-102);

(ii) securities issued to and held by the Partnership or an affiliate of the Partnership;

(iii) debt securities issued to and held by banks, loan corporations, loan and investment corporations, savings companies, trust corporations, treasury branches or credit unions, financial services cooperatives, insurance companies or other financial institutions;

(iv) securities issued under the exemptions from the registration requirement and prospectus requirement in Section 2.35 of National Instrument 45-106 *Prospectus and Registration Exemptions*;

(v) Series 2 Shares and Series 3 Shares; and

(vi) other series of Preferred Shares that, but for the fact they are convertible to other series of Preferred Shares (the **Resulting Preferred Shares**), are designated credit support securities (as such term is defined in NI 51-102) provided that the Resulting Preferred Shares are securities in respect of which the Partnership will provide a full and unconditional guarantee of the payments to be made by the Issuer, as stipulated in the terms of such shares, which will result in the holders of such securities being entitled to receive payment from the Partnership within 15 days of any failure by the Issuer to make a payment.

Relief from the Certification Requirements

The further decision of the Decision Makers under the Legislation is that relief from the Certification Requirements is granted, provided that the Issuer continues to satisfy the conditions of the relief from the Continuous Disclosure Requirements, above.

Relief from the Audit Committee Requirements

The further decision of the Decision Makers under the Legislation is that relief from the Audit Committee Requirements is granted, provided that the Issuer continues to satisfy the conditions of the relief from the Continuous Disclosure Requirements, above.

Relief from the Corporate Governance Requirements

The further decision of the Decision Makers under the Legislation is that relief from the Corporate Governance Requirements is granted, provided that:

(a) the Issuer continues to satisfy the conditions of Section 1.3(d)(ii) of NI 58-101; and

(b) the Issuer does not have equity securities trading on a marketplace (as defined in NI 58-101), other than (i) non-convertible, non-participating preferred securities, (ii) Series 2 Shares, (iii) Series 3 Shares, or (iv) other series of Preferred Shares that, but for the fact they are convertible to other series of Preferred Shares, are designated credit support securities (as defined in NI 51-102).

Relief from the Insider Reporting Requirements

The further decision of the Decision Makers under the Legislation is that relief from the Insider Reporting Requirements is granted, provided that:

(a) the Issuer continues to satisfy all the conditions set forth in subsection 13.4(2)(a) and (b) of NI 51-102;

(b) the Issuer does not issue any securities, and does not have any securities outstanding, other than:

(i) designated credit support securities (as such term is defined in NI 51-102);

(ii) securities issued to and held by the Partnership or an affiliate of the Partnership;

(iii) debt securities issued to and held by banks, loan corporations, loan and investment corporations, savings companies, trust corporations, treasury branches or credit unions, financial services cooperatives, insurance companies or other financial institutions;

(iv) securities issued under the exemptions from the registration requirement and prospectus requirement in Section 2.35 of National Instrument 45-106 *Prospectus and Registration Exemptions*;

(v) Series 2 Shares and Series 3 Shares; and

(vi) other series of Preferred Shares that, but for the fact they are convertible to other series of Preferred Shares, are designated credit support securities (as such term is defined in NI 51-102);

(c) if the insider is not the Partnership, the insider does not receive, in the ordinary course, information as to material facts or material changes concerning the Issuer before the material facts or material changes are generally disclosed, and (ii) the insider is not an insider of the Partnership in any capacity other than by virtue of being an insider of the Issuer; and

(d) if the insider is the Partnership, the Partnership does not beneficially own any designated credit support securities of the Issuer.

Relief from the Short Form Prospectus Eligibility Requirement

The further decision of the Decision Makers under the Legislation is that relief from the Short Form Prospectus Eligibility Requirement in respect of the distribution of the Series 2 Shares, and other series of Preferred Shares that, but for the fact they are convertible to other series of Preferred Shares, are designated credit support securities (as such term is defined in NI 51-102), is granted, provided that the Issuer satisfies all of the conditions in section 2.4 of NI 44-101, except for the requirement that the Series 2 Shares, or other series of Preferred Shares that, but for the fact they are convertible to other series of Preferred Shares, are designated credit support securities (as such term is defined in NI 51-102), as the case may be, be non-convertible.

Request for Confidentiality

The further decision of the Decision Makers under the Legislation is that the Request for Confidentiality is granted until the earlier of: (i) the date on which the Issuer is issued a receipt for the preliminary short form prospectus in respect of the distribution of the Series 2 Shares; (ii) the date that the Issuer advises the Decision Makers that there is no longer any need for the Confidential Material to remain confidential; and (iii) the date that is 90 days after the date of this decision.

“Blaine Young”
Associate Director, Corporate Finance

2.1.10 Great-West Lifeco Inc. et al.

Headnote

National Policy 11-203 Process for Exemptive Relief Applications in Multiple Jurisdictionsand Multilateral Instrument 11-102 Passport System – Take-over Bids – Identical Consideration – Issuer needs relief from the requirement in subsection 97(1) of the Securities Act (Ontario) that all holders of the same class of securities must be offered identical consideration. Exemption granted from the requirement to offer identical consideration to all of the holders of the same class of securities that are subject to an issuer bid. Exemption granted because the applicant satisfies the decision maker that the value given to all shareholders is substantially the same.

Applicable Legislative Provisions

Securities Act, R.S.O. 1990, c. S.5, as am., ss. 97(1), 104(2)(c).

December 13, 2009

IN THE MATTER OF
THE SECURITIES LEGISLATION OF
MANITOBA AND ONTARIO
(the Jurisdictions)

AND

IN THE MATTER OF
THE PROCESS FOR EXEMPTIVE RELIEF
APPLICATIONS IN MULTIPLE JURISDICTIONS

AND

IN THE MATTER OF
GREAT-WEST LIFECO INC.,
GREAT-WEST LIFE CAPITAL TRUST AND
CANADA LIFE CAPITAL TRUST
(collectively, the Filer)

DECISION

Background

The securities regulatory authority or regulator in each of the Jurisdictions (**Decision Maker**) has received an application from the Filer for a decision under the securities legislation of the Jurisdictions (the **Legislation**) exempting the Filer from subsection 2.23(1) of Multilateral Instrument 62-104 *Take-Over Bids and Issuer Bids* and subsection 97(1) of the *Securities Act* (Ontario) (the **Identical Consideration Requirement**), which require the Filer to offer identical consideration to all of the holders of the same class of securities that are subject to an issuer bid in connection with Great-West Lifeco Inc.'s offer to acquire up to 170,000 of the outstanding Great-West Life Trust Securities – Series A (**GREATS**) of Great-West Life Capital Trust and up to 180,000 of the outstanding Canada Life Capital Securities – Series A (**CLiCS – Series A**) of Canada Life Capital Trust (the **Exemption Sought**).

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a dual application):

(a) the Manitoba Securities Commission is the principal regulator for this application;

(b) the Filer has provided notice that subsection 4.7(1) of Multilateral Instrument 11-102 *Passport System* (**MI 11-102**) is intended to be relied upon in British Columbia, Alberta, Saskatchewan, Quebec, New Brunswick, Nova Scotia, Newfoundland, Prince Edward Island, Nunavut, Yukon Territory and the Northwest Territories; and

(c) the decision is the decision of the principal regulator and evidences the decision of the securities regulatory authority or regulator in Ontario.

Interpretation

Terms defined in National Instrument 14-101 *Definitions* and MI 11-102 have the same meanings if used in this decision, unless otherwise defined.

Representations

The decision is based on the following facts represented by the Filer:

The Filers

1. On November 11, 2009, Great-West Lifeco made an offer (the **Offer**) to the holders of GREATs and CLiCS – Series A to tender their GREATS and CLiCS – Series A to its offer to purchase up to 170,000 of the outstanding GREATs and up to 180,000 of the outstanding CLiCS – Series A.

2. Great-West Lifeco was incorporated under the *Canada Business Corporations Act* and its head office is located in Winnipeg, Manitoba.

3. Each of Great-West Life Capital Trust and Canada Life Capital Trust is an open-end trust established under the laws of Ontario. The head office of Great-West Life Capital Trust is located in London, Ontario and the head office of Canada Life Capital Trust is located in Toronto, Ontario.

4. Each of the Filers is a reporting issuer in each province and territory of Canada and is not in default of any of the requirements of the applicable securities legislation of such jurisdictions.

5. Great-West Life Capital Trust is authorized to issue an unlimited number of units and currently has two classes of units: special trust securities and GREATs. All of the special trust securities are indirectly held by Great-West Lifeco and there are 350,000 GREATs outstanding.

6. Canada Life Capital Trust is authorized to issue an unlimited number of units and currently has two classes of units outstanding: special trust securities and CLiCS (Series A and Series B). All of the special trust securities are indirectly held by Great-West Lifeco and there are 300,000 CLiCS – Series A and 150,000 CLiCS – Series B, outstanding.

7. The GREATs and CLiCS are not listed on any exchange.

The Bid

8. Pursuant to the Offer, holders of GREATs and CLiCS – Series A will receive consideration payable at the election of the holder in (a) cash; or (b) debentures of Great-West Lifeco due November 16, 2039 (the **Debentures**) plus cash.

9. The Debentures to be issued under the Offer will be either up to an additional $350 million of debentures of Great-West Lifeco due November 16, 2039 to be issued pursuant to a trust indenture dated November 16, 2009 (the **Prospectus Debentures**), or up to $350 million aggregate principal amount of a new issue of debentures with the same maturity date as the Prospectus Debentures (the **New Issue Debentures**). The determination of whether Prospectus Debentures or New Issue Debentures will be issued pursuant to the Offer will be determined based upon the amount by which interest rates change between November 11, 2009, the date that the Offer commenced and the date that Debentures are to be issued pursuant to the Offer.

10. The Debentures are not convertible into any other security.

11. Rule 802 (**Rule 802**) under the United States *Securities Act of 1933*, as amended (the **1933 Act**) provides an exemption from the registration requirements of the 1933 Act for offers and sales in any exchange offer for a class of securities of a "foreign private issuer" (as defined for purposes of the 1933 Act and the rules and regulations issued by the U.S. Securities and Exchange Commission thereunder) if the holders of the foreign subject company resident in the United States hold no more than 10% of the securities that are the subject of the exchange offer (the **10% Condition**). Rule 800(h) provides that for the purposes of the calculation of the 10% Condition, securities held by the offeror are to be excluded. In order for Rule 802 to apply, holders resident in the United States must participate in the exchange offer on terms at least as favourable to those offered to the other holders of the subject securities, subject to an exception which allows the offeror to offer cash consideration to securityholders resident in states of the United States that do not have an applicable state "blue sky" exemption from the registration or qualification requirements of state securities laws.

12. To the knowledge of the Filer, Great-West Life Capital Trust and Canada Life Capital Trust are "foreign private issuers" within the meaning of Rule 405 of Regulation C under the 1933 Act.

13. To the knowledge of the Filer, the 10% Condition has not been met and, accordingly, the offer and sale of the Debentures would not be exempt from the registration requirements of the 1933 Act by virtue of Rule 802. Furthermore, there is no general exemption from state "blue sky" laws that coordinates with Rule 802; as a result, the securities laws of some states may prohibit delivery of the Debentures to holders of GREATs or CLiCS – Series A resident in such states without registration of the Debentures unless such holders are otherwise exempt investors under the laws of such states.

14. A geographic analysis report for the GREATs as of November 11, 2009, with respect to approximately 98.4% of the outstanding GREATs disclosed that: (i) residents in Canada comprise 2,358 holders, collectively holding approximately 82.07% of all GREATs reported; (ii) residents in the United States comprise 54 holders, collectively holding approximately 8.68% of all GREATS reported; and (iii) residents outside of Canada and the United States comprise 34 holders, collectively holding approximately 9.25% of all GREATs reported.

15. A geographic analysis report for the CLiCS – Series A as of November 11, 2009, with respect to approximately 91.5% of the outstanding CLiCS – Series A disclosed that: (i) residents in Canada comprise 810 holders of CLiCS – Series A, collectively holding approximately 75.36% of all CLiCS – Series A reported; (ii) residents in the United States comprise 27 holders, collectively holding approximately 11.11% of all CLiCS – Series A reported; and (iii) residents outside of Canada and the United States comprise 23 holders, collectively holding approximately 13.53% of all CLECS – Series A reported.

16. As noted above, holders of GREATs and CLiCS – Series A may elect to receive Debentures pursuant to the Offer. The Debentures have not been and will not be registered or otherwise qualified for distribution pursuant to the securities legislation of any jurisdiction outside of Canada, including the 1933 Act.

17. In lieu of delivering Debentures to U.S. holders of GREATs and/or CLiCS – Series A, GreatWest Lifeco intends to use a vendor placement mechanism, the details and procedures of which are described below and in the Offer for any U.S. holder that requests to receive Debentures

pursuant to the Offer. As a result of the vendor placement, the registration requirements of the 1933 Act will not apply as the Debentures will not be delivered in the United States or to U.S. holders.

18. In accordance with the vendor placement mechanism and the Offer, Great-West Lifeco proposes to deliver to Computershare Investor Services Inc. (the **Depositary**), the Debentures that the non-residents of Canada would otherwise be entitled to receive pursuant to the Offer. The Depositary will cause to be sold those Debentures after the payment date for the GREATs and CLiCS – Series A tendered by non-residents pursuant to the Offer. After completion of the sale, the Depositary will distribute the aggregate net proceeds of sale, pro rata, among the non-residents who tendered their GREATs or CLiCS – Series A pursuant to the Offer and who elected to receive Debentures.

19. Any sale of the Debentures described above will be completed as soon as practicable after the date on which Great-West Lifeco takes up and pays for the GREATs and/or CLiCS – Series A tendered by non-residents pursuant to the Offer and will be done in a manner intended to maximize consideration to be received from the sale of Debentures and to minimize any adverse impact of the sale on the market for the Debentures.

20. To the extent there are any holders of GREATs and/or CLiCS – Series A in jurisdictions outside of Canada and the United States to whom the Debentures may not be delivered without registration or qualification under the laws of their own jurisdiction, Great-West Lifeco proposes using the vendor placement mechanism described above, modified as necessary to comply with the laws of such foreign jurisdiction.

21. The Debentures, GREATs and CLiCS-Series A are not listed but have a market for trading and that market will not be materially less liquid upon successful completion of the Offer.

22. On the market on which the Debentures trade, based on one month of trading since November 9, 2009, the aggregate traded volume of the Debentures has been at least $17,000,000 of the $200,000,000 issue currently outstanding, and the aggregate value of the trades has been at least $15,000,000 and the market value of the Debentures was at least $75,000,000.

23. If Great-West Lifeco increases the consideration offered pursuant to the Offer to holders of GREATs and/or CLiCS – Series A resident in Canada. the increase in consideration will also be offered to any non-residents of Canada at the same time and on the same basis.

24. Great-West Lifeco has sufficient cash available to satisfy the consideration offered pursuant to the Offer in the event all holders of GREATs and/or CLiCS – Series A who deposit to the Offer elect to receive cash.

25. Except to the extent that relief from the Identical Consideration Requirement is granted, the Offer will comply with the requirements under the legislation concerning issuer bids.

Decision

Each of the Decision Makers is satisfied that the decision meets the test set out in the Legislation for the Decision Maker to make the decision.

The decision of the Decision Makers under the Legislation is that, in connection with the Offer, the Exemption Sought is granted so that the Filer is exempt from the Identical Consideration Requirement, provided that non-Canadian holders of GREATs or CLiCS – Series A who would otherwise receive Debentures pursuant to the Offer, instead receive cash proceeds from the sale of the Debentures in accordance with the procedures set out in paragraphs 18 and 19 above.

"Douglas R. Brown"
Director & Secretary to the Commission
The Manitoba Securities Commission

2.1.11 Southern Pacific Resource Corp.

Headnote

National Policy 11-203 Process for Exemptive Relief Applications in Multiple Jurisdictions – s. 13.1 of National Instrument 51-102 Continuous Disclosure Obligations (NI 51-102) – exemption from the requirement under Part 8 of NI 51-102 to provide the financial statement disclosure in a business acquisition report (BAR) – Filer would have been able to use exemption in s. 8.10(3) to file alternative disclosure except that the transaction was structured for tax reasons as an acquisition of securities of a company incorporated for the specific purpose of acquiring the oil and gas properties and related assets from the vendor. Filer will provide alternative disclosure on the basis that the acquisition was in substance an acquisition by the Filer of an interest in oil and gas properties.

Applicable Legislative Provisions

National Instrument 51-102 Continuous Disclosure Obligations.

Citation: Southern Pacific Resource Corp., Re, 2009 ABASC 641

December 31, 2009

IN THE MATTER OF
SECURITIES LEGISLATION OF
ALBERTA AND ONTARIO
(the Jurisdictions)

AND

IN THE MATTER OF
THE PROCESS OF EXEMPTIVE RELIEF
APPLICATIONS IN MULTIPLE JURISDICTIONS

AND

IN THE MATTER OF
SOUTHERN PACIFIC RESOURCE CORP.
(the Filer)

DECISION

Background

The securities regulatory authority or regulator in each of the Jurisdictions (**Decision Maker**) has received an application from the Filer for a decision under the securities legislation of the Jurisdictions (the **Legislation**) exempting the Filer from the requirement to include in a business acquisition report (**BAR**) certain financial information as required under National Instrument 51-102 *Continuous Disclosure Obligations* (**NI 51-102**) in respect of a significant acquisition made by the Filer, on the condition that the Filer include in the BAR certain alternative financial information as more particularly described below (the **Exemption Sought**).

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a dual application):

(a) the Alberta Securities Commission is the principal regulator for this application,

(b) the Filer has provided notice that section 4.7(1) of Multilateral Instrument 11-102 *Passport System* (**MI 11-102**) is intended to be relied upon in British Columbia, Manitoba, and Saskatchewan, and

(c) the decision is the decision of the principal regulator and evidences the decision of the securities regulatory authority or regulator in Ontario.

Interpretation

Terms defined in National Instrument 14-101 *Definitions* and MI 11-102 have the same meaning if used in this decision, unless otherwise defined.

Representations

This decision is based on the following facts represented by the Filer:

1. The Filer is a corporation amalgamated under the *Business Corporations Act* (Alberta). Its head office is located in Calgary, Alberta.

2. The Filer is an independent oil and gas company engaged in the business of exploring for, developing, and producing petroleum and natural gas reserves in the Western Canadian sedimentary basin.

3. The Filer is a reporting issuer in the provinces of Alberta, British Columbia, Saskatchewan, Manitoba and Ontario and is not, to its knowledge, in default of its obligations as a reporting issuer under the securities legislation of the Jurisdictions.

4. On October 9, 2009, the Filer entered into a share purchase and sale agreement (the **Acquisition Agreement**) with a major oil and gas company (the **Vendor**) providing for the indirect acquisition (the **Acquisition**) by the Filer of certain oil and gas properties, facilities, and related assets (the **Assets**). The Acquisition completed on November 3, 2009.

5. Pursuant to the Acquisition Agreement, the Filer acquired 100% of the issued and outstanding shares of Senlac Oil Ltd. (**Senlac**), a wholly-owned subsidiary of the Vendor incorporated on September 29, 2009 for the purpose of facilitating the Acquisition.

6. Subsequent to the entering into of the Acquisition Agreement and prior to the closing of the Acquisition, the Vendor transferred the Assets to

Senlac. Accordingly, at the time of closing of the Acquisition, the Assets were held by Senlac.

7. The transfer of the Assets from the Vendor to Senlac was made for the purpose of facilitating the Acquisition in a manner that achieved certain tax efficiencies for the Vendor.

8. The Acquisition constitutes a "significant acquisition" for the Filer within the meaning of Part 8 of NI 51-102. Accordingly, the Filer is required to file a BAR in respect of the Acquisition.

9. The financial year end of the Filer is June 30 and the financial year end of the Vendor was December 31.

10. Pursuant to item 3 of Form 51-102F4 and Part 8 of NI 51-102, the Filer would, absent the Exemption Sought, be required to include in its BAR for the Acquisition, subject to the exemptions provided therein:

    (a) an income statement, a statement of retained earnings and a cash flow statement for each of the two most recently completed financial years in respect of the Assets; a balance sheet as at the end of each such financial year, and notes to the financial statements;

    (b) an auditors' report on the income statement, statement of retained earnings and cash flow statement for the most recently completed financial year in respect of the Assets and the balance sheet as at the end of such financial year;

    (c) a pro forma balance sheet of the Filer as at September 30, 2009 that gives effect to the Acquisition as if it had taken place as at such date; and

    (d) a pro forma income statement of the Filer for the financial year ended June 30, 2009 and for the three month interim period ended September 30, 2009, in each case giving effect to the Acquisition as if it had taken place at June 30, 2009, together with pro forma earnings per share.

11. Section 8.10(3) of NI 51-102 provides an exemption from the financial statement disclosure requirements that would otherwise apply under Part 8 of NI 51-102 if the significant acquisition is of a business that is an interest in an oil and gas property, provided that, among other things: (i) the acquisition is not an acquisition of securities of another issuer; and (ii) the Filer includes in the BAR for the Acquisition historical operating statements in respect of the Assets and pro forma operating statements of the Filer as required under section 8.10(3)(e) of NI 51-102.

12. All of the conditions set forth in section 8.10(3) of NI 51-102 are satisfied, except for the fact that the Acquisition is an acquisition of securities of another issuer.

13. The Filer proposes to include in the BAR to be filed in respect of the Acquisition:

    (a) an audited statement of revenues, royalties and operating expenses in respect of the Assets for the year ended December 31, 2008;

    (b) an unaudited statement of revenues, royalties and operating expenses in respect of the Assets for the year ended December 31, 2007;

    (c) unaudited statements of revenues, royalties and operating expenses in respect of the Assets for the nine month period ended September 30, 2009 and September 30, 2008, respectively;

    (d) an unaudited pro forma consolidated statement of revenues, royalties and operating expenses of the Filer for the year ended June 30, 2009 giving effect to the Acquisition as if it had taken place at July 1, 2008;

    (e) an unaudited pro forma consolidated statement of revenues, royalties and operating expenses of the Filer for the three months period ended September 30, 2009 giving effect to the Acquisition as if it had taken place at July 1, 2008;

    (f) a description of the Assets and disclosure regarding the annual oil and gas production volumes from the Assets, as contemplated in subparagraphs 8.10(3)(e)(iii) and (iv) of NI 51-102; and

    (g) information regarding estimated reserves and related future net revenue attributable to the Assets and estimated oil and gas production volumes therefrom, as contemplated in section 8.10(3)(g) of NI 51-102.

    (collectively, the **Alternative Financial Disclosure**)

14. The Acquisition was, in substance, an acquisition by the Filer of an interest in oil and gas properties constituting a business. For certain tax efficiencies, the transaction was structured as a purchase by the Filer of all of the issued and outstanding shares of Senlac with the Vendor

transferring the Assets to Senlac prior to closing. Otherwise, the Filer would have acquired the Assets directly from the Vendor and availed itself of the exemption provided in section 8.10(3) of NI 51-102 with respect to the kind of financial disclosure to be included in the BAR.

15. The Filer seeks a decision of the Decision Makers under section 13.1 of NI 51-102 exempting the Filer from the requirement to include in the BAR to be filed in respect of the Acquisition the financial statements and other information required pursuant to item 3 of Form 51-102F4, provided that the BAR includes the Alternative Financial Disclosure.

Decision

Each of the Decision Makers is satisfied that the decision meets the test set out in the Legislation for the Decision Maker to make the decision.

The decision of the Decision Makers under the Legislation is that the Exemption Sought is granted provided that the Filer includes the Alternative Financial Disclosure in the BAR to be filed in respect of the Acquisition.

"Blaine Young"
Associate Director, Corporate Finance

2.1.12 The Fédération des Caisses Desjardins du Québec and the Funds Listed in Schedule "A"

Headnote

National Policy 11-203 Process for Exemptive Relief Applications in Multiple Jurisdictions – Hybrid Review – Extension of the lapse date of the simplified prospectus for 52 days until completion of the Funds Reorganization.

Applicable Legislative Provisions

National Instrument 81-101 Mutual Fund Prospectus Disclosure, s. 2.5(7).
Securities Act, R.S.O. 1990, c. S.5, as am., s. 62(5).

December 16, 2009

IN THE MATTER OF
THE SECURITIES LEGISLATION OF
QUÉBEC AND ONTARIO

AND

IN THE MATTER OF
THE PROCESS FOR EXEMPTIVE RELIEF
APPLICATIONS IN MULTIPLE JURISDICTIONS

AND

IN THE MATTER OF
THE FÉDÉRATION DES CAISSES DESJARDINS
DU QUÉBEC
(the "Filer")

AND

IN THE MATTER OF
THE FUNDS LISTED IN SCHEDULE "A"
(each a "Fund", together the "Funds")

DECISION

Background

The securities regulatory authority in Quebec has received an application from the Filer, on behalf of the Funds, for a decision under the securities legislation of the jurisdiction of the principal regulator (the "Legislation") for relief under section 2.5(7) of National Instrument 81-101 that the time limits be extended to enable the Funds to continue the distribution of their securities to the time limits that would apply if the lapse date of the simplified prospectus and annual information form of the Funds was March 8, 2010 (the "Passport Exemption").

The securities regulatory authority or regulator in Ontario (the "Coordinated Exemptive Relief Decision Maker") has received an application from the Filer, on behalf of the Funds, for a decision under the securities legislation of Ontario for relief under section 62(5) of the *Securities Act* (Ontario) (the "Act") that the time limits be extended to enable the Funds to continue the distribution of their

securities to the time limits that would apply if the lapse date of the simplified prospectus and annual information form of the Funds was March 8, 2010 (the "Coordinated Exemptive Relief").

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for hybrid applications):

a) the Autorité des marchés financiers du Québec is the principal regulator for this application;

b) the Filer has provided notice that section 4.7(1) of Multilateral Instrument 11-102 *Passport System* ("MI 11-102") is intended to be relied upon in each of the other provinces and territories of Canada except Ontario;

c) the decision is the decision of the principal regulator; and the decision evidences the decision of the Coordinated Exemptive Relief Decision Maker.

Interpretation

Terms defined in National Instrument 14-101 – *Definitions* and MI 11-102 have the same meaning if used in this decision, unless otherwise defined.

"NI 81-101" means National Instrument 81-101 *Mutual Fund Prospectus Disclosure*

"NI 81-102" means National Instrument 81-102 *Mutual Funds*

"NI 81-106" means National Instrument 81-106 *Investment Fund Continuous Disclosure*

Representations

This decision is based on the following facts represented by the Filer:

1. The Filer is the manager and trustee of the Funds.

2. The Funds are open-ended mutual fund trusts established under the laws of Québec pursuant to a declaration of trust.

3. The Funds have been authorized to distribute their securities in each of the provinces and territories of Canada under a simplified prospectus and annual information form dated January 15, 2009 as amended by amendments dated June 2, 2009.

4. The Funds are reporting issuers under the laws of each of the provinces and territories of Canada. None of the Funds is in default of any of the requirements of the Legislation.

5. Pursuant to the Legislation and the Act, the lapse date for the distribution of securities of the Funds is currently January 15, 2010. In each jurisdiction, provided a pro forma simplified prospectus is filed 30 days prior to January 15, 2010 (by December 16, 2009), a final version of the simplified prospectus is filed by January 25, 2010, and a receipt for the simplified prospectus is issued by the securities regulatory authorities by February 4, 2010, securities of the Funds may be distributed without interruption throughout this prospectus renewal period.

6. The Filer is contemplating mergers of funds and mandate changes that will affect the Funds (the "Reorganization"), and which, should they occur, will be considered by the directors of the Filer at a meeting to be held on or about January 12, 2010 and, when approved by the directors of the Filer, by securityholders of the applicable Funds at meetings to be called for such purposes on or about March 8, 2010 and would take effect no later than March 18, 2010.

7. Any Fund mergers and mandate changes that occur will be effected in accordance with the requirements of NI 81-102 and NI 81-106 including, without limitation, filing appropriate amendments to the simplified prospectus and annual information form of the Funds and seeking Independent Review Committee, securityholders and regulatory approval where necessary.

8. The Filer wishes to extend the lapse date for the Funds to March 8, 2010 in order to provide time for the Reorganization to be considered, planned and implemented such that the renewed simplified prospectus and annual information can be filed on or about March 18, 2010 and will include appropriate post-Reorganization disclosure.

9. The Filer proposes to file a pro forma simplified prospectus and annual information form in respect of all the Funds by February 6, 2010 and the final simplified prospectus and annual information form in respect of all the Funds on or about March 18, 2010, with the final receipt to issue on or about that date.

10. In the absence of this decision, NI 81-101 and section 62(2) of the Act require that the Funds would have to file a final simplified prospectus and annual information form by January 25, 2010 and receive a final receipt by February 4, 2010.

11. Since June 2, 2009, the date of the most recently filed amendments to the simplified prospectus and annual information form for the Funds, no undisclosed material change has occurred in respect of the Funds. Accordingly, such prospectus and annual information form, as amended, represent the current information regarding each of the Funds. The extension requested will not affect the currency or accuracy of the information contained in the simplified prospectus and annual information form. Up to date financial information about the Funds will be

available to investors within the audited annual financial statements and management report of fund performance for the period ended September 30, 2009, which will be filed by December 29, 2009. As a result, the extension of the lapse date will not be prejudicial to the public interest.

Decision

Each of the principal regulator and the Coordinated Review Decision Maker is satisfied that the decision meets the test set out in the Legislation and the Act, respectively, for the relevant regulator or securities regulatory authority to make the decision.

The decision of the principal regulator under the Legislation is that the Passport Exemption is granted.

The decision of the Coordinated Review Decision Maker under the Act is that the Coordinated Exemptive Relief is granted.

"Josée Deslauriers"
Director, Investment Funds and Continuous Disclosure
Autorité des marchés financiers

SCHEDULE "A"

The Funds

Desjardins Money Market Fund
Desjardins Short-Term Income Fund
Desjardins Canadian Bond Fund
Desjardins Enhanced Bond Fund
Desjardins Capital Yield Bond Fund
Desjardins Northwest Specialty Global High Yield Bond Fund
Desjardins Canadian Balanced Fund
Desjardins Québec Balanced Fund
Desjardins Dividend Income Fund
Desjardins Dividend Growth Fund
Desjardins Canadian Equity Value Fund
Desjardins Canadian Equity Fund
Desjardins Fidelity True North® Fund
Desjardins Canadian Small Cap Equity Fund
Desjardins Northwest Specialty Equity Fund
Desjardins American Equity Value Fund
Desjardins American Equity Growth Fund
Desjardins Global Equity Value Fund
Desjardins Global All Cap Equity Fund
Desjardins Overseas Equity Value Fund
Desjardins Global Real Estate Fund
Desjardins Global Small Cap Equity Fund
Desjardins Emerging Markets Fund
Desjardins Alternative Investments Fund
Desjardins Enhanced Alternative Investments Fund
Desjardins Environment Fund
SocieTerra Secure Market Portfolio
SocieTerra Balanced Portfolio
SocieTerra Growth Portfolio
SocieTerra Growth Plus Portfolio

2.1.13 Investia Financial Services Inc.

Headnote

National Policy 11-203 Process for Exemptive Relief Applications in Multiple Jurisdictions – NI 81-105 Mutual Fund Sales Practices, s. 9.1 – exemption from subsection 7.1(3) of NI 81-105 to participating dealers to pay a commission rebate for clients to switch to related funds – the relief will not be prejudicial to clients.

Applicable Legislative Provisions

National Instrument 81-105 Mutual Funds Sales Practices, ss. 7.1(1)(b), 7.1(3), 9.1.

December 15, 2009

IN THE MATTER OF
THE SECURITIES LEGISLATION OF
QUEBEC AND ONTARIO
(the Jurisdictions)

AND

IN THE MATTER OF
THE PROCESS FOR EXEMPTIVE RELIEF
APPLICATIONS IN MULTIPLE JURISDICTIONS

AND

IN THE MATTER OF
INVESTIA FINANCIAL SERVICES INC.
(Investia or the Filer)

DECISION

Background

The securities regulatory authority or regulator in each of the Jurisdictions (Decision Maker) has received an application from the Filer for a decision under the securities legislation of the Jurisdictions (the Legislation) for an exemption under Section 9.1 of National Instrument 81-105 *Mutual Fund Sales Practices* (NI 81-105) exempting the Filer and its present and future representatives (the "Representatives") from the prohibitions contained in paragraph 7.1(1)(b) and subsection 7.1(3) of NI 81-105 prohibiting the Filer and its Representatives from paying to a securityholder all or any part of a fee or commission payable by the securityholder on the redemption of securities of a mutual fund that occurs in connection with the purchase by the securityholder of securities of another mutual fund that is not in the same mutual fund family (a commission rebate) where the Filer is a member of the organization of the mutual fund the securities of which are being acquired (the Exemption Sought).

Under the Process for Exemptive Relief Applications in Multiple Jurisdictions (for a dual application):

(a) the Autorité des marchés financiers is the principal regulator for this application,

(b) the Filer has provided notice that section 4.7(1) of Multilateral Instrument 11-102 *Passport System* (MI 11-102) is intended to be relied upon in British Columbia, Alberta, Saskatchewan, Manitoba, New Brunswick, Nova Scotia, Prince Edward Island, Newfoundland and Labrador, Northwest Territories and Yukon Territories, and

(c) the decision is the decision of the principal regulator and evidences the decision of the securities regulatory authority or regulator in Ontario.

Interpretation

Terms defined in National Instrument 14-101 *Definitions* and MI 11-102 have the same meaning if used in this decision, unless otherwise defined.

Representations

This decision is based on the following facts represented by the Filer:

1. Investia is registered in each of the provinces and territories of Canada except Nunavut as a dealer in the category of mutual fund dealer. Investia is also registered as an exempt market dealer in Ontario and Newfoundland and Labrador. Investia is a member of the Mutual Fund Dealers Association of Canada. The head office of Investia is located in Québec City, Québec.

2. The Filer is a "member of the organization" (within the meaning of NI 81-105) of the mutual funds managed by IA Clarington Investments Inc. (IA Clarington), known as the "IA Clarington Funds". The Filer may become in the future, a "member of the organization" of other mutual funds, since the parent company or an affiliate of the Filer may establish or acquire interests in corporations that are managers of mutual funds (Future Affiliated Funds).

3. The Filer is a direct wholly-owned subsidiary of Industrial Alliance Insurance and Financial Services Inc. (Industrial Alliance). IA Clarington is also a direct wholly-owned subsidiary of Industrial Alliance.

4. The Filer is not in default of securities legislation in any jurisdiction of Canada.

5. The Filer acts as a participating dealer (within the meaning of NI 81-105) in respect of the IA Clarington Funds as well as for third party managed mutual funds.

6. The Filer acts independently from IA Clarington and has no connection with IA Clarington, other than through its common parent company. The Filer and its Representatives are free to choose which mutual funds to recommend to their clients and consider recommending the IA Clarington Funds to their clients in the same way as they consider recommending other third party mutual funds. The Filer and its Representatives comply with their obligation at law and only recommend mutual funds that they believe would be suitable for their clients and in accordance with their clients' investment objectives. IA Clarington provides the Filer with the compensation described in the prospectus of the IA Clarington Funds in the same manner as IA Clarington does for any participating dealer selling securities of the IA Clarington Funds to their clients. All compensation and sales incentives paid to the Filer by any member of the organization of the IA Clarington Funds or of any Future Affiliated Funds will comply with NI 81-105.

7. Neither the Filer, nor any of its Representatives, is or will be subject to quotas (whether express or implied) in respect of selling the IA Clarington Funds. Neither the Filer nor IA Clarington or any other member of their organization, provide any incentive (whether express or implied) to the Filer's Representatives or to the Filer to encourage those Representatives or the Filer to recommend the IA Clarington Funds over third-party managed mutual funds.

8. The Filer complies with NI 81-105, in particular, Part 4 of NI 81-105 in its compensation practices with the Representatives.

9. No Representative of the Filer has an equity interest in the Filer (within the meaning of NI 81-105) or in any other member of the organization of the IA Clarington Funds.

10. The prohibitions in Section 7.1 of NI 81-105 mean that neither the Filer nor its Representatives can reimburse their client for any fees or commissions incurred by those clients when they decide to switch into an IA Clarington Fund from another mutual fund. Section 7.1 allows the Filer and its Representatives to pay commission rebates when the client decides to switch from one third party fund to another third party fund, provided the disclosure and consent procedure established in section 7.1 is followed.

11. Payment of commission rebates by the Filer and its Representatives benefit the client so that the client does not incur costs in switching from one fund to another.

Decision

Each of the Decision Makers is satisfied that the decision meets the test set out in the Legislation for the Decision Maker to make the decision.

The decision of the Decision Makers under the Legislation is that the Exemption Sought is granted provided that:

(a) The Representatives and the Filer will comply with the provisions of paragraph 7.1(1)(a) of NI 81-105.

(b) The Representatives and the Filer will comply with the disclosure and consent provisions of Part 8 of NI 81-105.

(c) The clients of the Filer will be advised by the Filer and its Representatives, in writing and in advance of finalizing the switch, that any commission rebate proposed to be made available in connection with the purchase of securities of IA Clarington Funds or Future Affiliated Funds:

(i) will be available to the client regardless of whether the redemption proceeds are invested in an IA Clarington Fund, a Future Affiliated Fund or a third party fund (to the maximum of the commission earned by the Representative on the purchase);

(ii) will not be conditional upon the purchase of securities of an IA Clarington Fund or a Future Affiliated Fund; and

(iii) in all cases, be not more than the amount of the gross sales commission earned by the Filer on the client's purchase of an IA Clarington Fund or a Future Affiliated Fund.

(d) The actual amount of the commission rebate paid in respect of the switch will be not more than the amount referred to in paragraph (c)(iii) above.

(e) The Filer or its Representatives that provide commission rebates will not be reimbursed directly or indirectly in respect of the commission rebate in connection with a switch to an IA Clarington Fund or a Future Affiliated Fund by any member of the organization of that fund.

(f) The Filer's compliance policies and procedures that relate to this decision will emphasize that any commission rebate agreed to be paid to a client by a Representative cannot be conditional on the client acquiring an IA Clarington Fund or a Future Affiliated Fund and will be made available to the client if the client wishes to switch to an unrelated third-party fund.

(g) This decision shall cease to be operative with respect to a Decision Maker following the entry into force of a rule of that Decision Maker which replaces or amends section 7.1 of NI 81-105.

"Claude Prévost"
The Assistant Executive Director, Registrant Services,

2.1.14 Blackmont Capital Inc. and Broadridge Investor Communications Corporation – MRRS Decision

Headnote

Mutual Reliance Review System for Exemptive Relief Applications – exemption granted to permit dealers to satisfy the requirement under securities legislation to deliver or send a prospectus of a mutual fund using the Smart Prospectus® Service, provided by Broadridge Investor Communications Corporation, bound together with additional documents – additional documents are restricted to documents that are either required or permitted by the Legislation to be delivered to investors, for mutual funds and non-mutual funds, and do not include marketing material – investors to receive consolidated reporting of all of the trades placed by the investor in an account through a particular Dealer on a given day, along with the additional documents

Applicable Legislative Provisions

National Instrument 81-101 Mutual Fund Prospectus Disclosure, ss. 3.2(2), 5.1(3), 5.2, 6.1(2).

December 30, 2009

IN THE MATTER OF
THE SECURITIES LEGISLATION OF
BRITISH COLUMBIA, ALBERTA, SASKATCHEWAN,
MANITOBA, ONTARIO, QUÉBEC,
NEW BRUNSWICK, NOVA SCOTIA,
PRINCE EDWARD ISLAND,
NEWFOUNDLAND AND LABRADOR, YUKON
TERRITORY, NORTHWEST TERRITORIES AND
NUNAVUT TERRITORY
(the Jurisdictions)

AND

IN THE MATTER OF
NATIONAL INSTRUMENT 81-101
MUTUAL FUND PROSPECTUS DISCLOSURE
(NI 81-101)

AND

IN THE MATTER OF
THE MUTUAL RELIANCE REVIEW SYSTEM
FOR EXEMPTIVE RELIEF APPLICATIONS

AND

IN THE MATTER OF
BLACKMONT CAPITAL INC.
(Blackmont)

AND

IN THE MATTER OF
BROADRIDGE INVESTOR COMMUNICATIONS CORPORATION
(Broadridge, and together with Blackmont, the Filers)

MRRS DECISION DOCUMENT

Background

The local securities regulatory authority or regulator (the Decision Maker) in each of the Jurisdictions has received an application from the Filers for a decision under the securities legislation of the Jurisdictions (the Legislation) for:

- an exemption from the provision that the requirement under the Legislation to deliver or send a simplified prospectus of a mutual fund to a person or company is only satisfied by delivering or sending such document prepared in a particular

form stipulated in the Legislation that restricts the documents that may be attached to, or bound with, the simplified prospectus;

- an exemption from the restriction that a simplified prospectus may only be attached to, or bound with, certain documents permitted under the Legislation; and

- an exemption from the requirement to attach permitted documents to a simplified prospectus only in the order stipulated in the Legislation;

when Blackmont or other Dealers (as defined below) use the Smart Prospectus® Service (as defined below) to deliver a simplified prospectus to recipients in order to satisfy the requirement under the Legislation on Dealers to deliver a prospectus of a mutual fund to a person or a company (the Requested Relief) as described herein.

Under the Mutual Reliance Review System for Exemptive Relief Applications:

(a) the Ontario Securities Commission is the principal regulator for this application; and

(b) this MRRS decision document evidences the decision of each Decision Maker.

Interpretation

Defined terms contained in National Instrument 14-101 *Definitions* have the same meaning in this decision unless they are defined in this decision.

Representations

This decision is based on the following facts represented by the Filers:

General

1. Blackmont is a corporation incorporated under the laws of Ontario with its head office located in Toronto, Ontario and is registered as a dealer in the category of investment dealer in the Province of Ontario and has equivalent registration in each of the other Participating Jurisdictions.

2. Broadridge is a corporation incorporated under the laws of Nova Scotia with its head office located in Mississauga, Ontario.

3. Broadridge is in the business of investor communications including mailing or delivering on behalf of registered dealers to their clients preliminary prospectuses or simplified prospectuses, final prospectuses, trade confirmations, offering memoranda, continuous disclosure documentation and other documentation required or permitted under the Legislation to be so delivered or mailed in connection with trades and holdings of securities.

4. Registered dealers who sell securities issued by mutual funds are, pursuant to the Legislation, required to send or deliver confirmations of the trades in securities to the purchaser of such securities within specified time periods, and unless the registered dealer has previously done so, the registered dealer must send or deliver to the purchaser of such securities the latest prospectus and any amendments thereto (the Dealer Delivery Requirement).

5. Section 3.2(2) of National Instrument 81-101 (NI 81-101) provides that the requirement under the Legislation to deliver or send a simplified prospectus of a mutual fund to a person or company is satisfied by delivering or sending such document filed under NI 81-101 and prepared in accordance with Form 81-101F1 (the Form Requirement).

6. Subsection 5.1(3) of NI 81-101 lists those documents that may be attached to or bound with a simplified prospectus (the Attachment Requirement).

7. Section 5.2 of NI 81-101 specifies the order in which documents permitted to be attached to or bound with a simplified prospectus must be so attached or bound (the Order Requirement).

8. Using Broadridge's Smart Prospectus® service (Smart Prospectus® Service), a proprietary technology of Broadridge, Broadridge, with respect to all trades in mutual funds made by an investor in a day, prints and delivers by mail, or delivers electronically, trade confirmations, the required portions of one or more simplified prospectuses for securities issued by mutual funds together with any amendments thereto and a cover letter on behalf of registered dealers who have entered or will enter into contracts with Broadridge (the Dealers). The documents so delivered are in a format described in and are in compliance with the provisions of the MRRS Decision Document dated April 21, 2003 granted

on the application of ADP Investor Communications Corporation, the predecessor corporation of Broadridge, on behalf of the Dealers with respect to the Smart Prospectus® Service (the First Decision).

9. Pursuant to the First Decision, the Dealers are exempt from the Form Requirement, the Attachment Requirement and the Order Requirement, provided that they satisfy the Dealer Delivery Requirement by using the Smart Prospectus® Service provided by Broadridge under contract subject to certain conditions.

10. In response to the demands of Blackmont and other Dealers and their clients, Broadridge's technology has been adapted subsequent to the First Decision to permit various and broader uses of the Smart Prospectus® Service by Dealers in the sending or delivery of documents that may include a simplified prospectus that would not comply with one or more of the Form Requirement, the Attachment Requirement or the Order Requirement.

Additional Documents

11. Blackmont and other Dealers wish to enter into contracts with Broadridge to use the Smart Prospectus® Service with respect to the delivery of Additional Documents (as defined below) together with a simplified prospectus for securities issued by a mutual fund, in connection with the Dealer Delivery Requirement.

12. The technology underlying the Smart Prospectus® Service has been enhanced to permit the consolidation of trade confirmations for all trades by an investor in an account through a particular Dealer processed on the same day in one trade confirmation document. Such trades may be mutual fund trades and trades of non-mutual fund securities. Prior to such technological capability, each trade was confirmed by a separate paper trade confirmation. The clients of Blackmont prefer consolidated trade confirmations for trades processed on the same day. In Broadridge's experience, their Dealer clients prefer consolidated trade confirmations. Also, recent changes in the exemptions from prospectus and registration requirements have encouraged qualifying individuals to purchase securities in the exempt market as well as mutual funds resulting in an increased demand to consolidate confirmations for exempt trades and mutual fund trades.

13. The Smart Prospectus® Service also now permits the inclusion of documents in support of the delivery of consolidated trade confirmations in the same bound package as a simplified prospectus. Blackmont wishes to permit Broadridge to attach to and bind with the simplified prospectus such additional documents (Additional Documents, as further defined below) in using the Smart Prospectus® Service to permit it and other Dealers to satisfy the Dealer Delivery Requirement and provide other documents to support the consolidated trade confirmation.

14. The Additional Documents would be restricted to documents that are either required or permitted by the Legislation to be delivered to investors. The inclusion of Additional Documents reflects the ability of the new technology underlying the Smart Prospectus® Service to identify and produce an investor communication that includes, in a convenient format, material required by a consolidated trade confirmation, new and changing regulatory requirements and the changing investment practices of the public. Additional Documents include disclosure documents that are or may be from time to time required or permitted to be delivered to investors in respect of trades in a consolidated trade confirmation, such as long form or short form prospectuses with respect to securities, information folders, information memoranda, information statements, offering memoranda, information pages and term sheets with respect to securities or financial instruments distributed by a Dealer. Additional Documents may also include, but are not limited to, documents with respect to account opening, management or maintenance or other information that are or may be required or permitted to be delivered to investors in connection with a trade. Additional Documents will not include marketing material with respect to a mutual fund or other securities or financial instruments or a Dealer.

15. A simplified prospectus delivered or sent using the Smart Prospectus® Service including Additional Documents on behalf of a Dealer may not comply with the Attachment Requirement and the provisions of the First Decision in that one or more Additional Documents may be attached to the prospectus.

16. A simplified prospectus delivered or sent using the Smart Prospectus® Service including Additional Documents on behalf of a Dealer may also not comply with the Order Requirement and the provisions of the First Decision in that the portions of the prospectus may be preceded by one or more Additional Documents.

17. A simplified prospectus delivered or sent using the Smart Prospectus® Service including Additional Documents on behalf of a Dealer may also not comply with the Form Requirement and the provisions of the First Decision in that each page of each prospectus and Additional Document so delivered will have two page numbers: one relating to the page number in the prospectus or Additional Document and the second identifying a consecutive page number in the Smart Prospectus® Service document, which pagination system will be explained to the reader on the front of the Smart Prospectus® Service document.

18. The Filers submit that the Requested Relief would not be prejudicial to the public interest and will provide investors with concise and better organized documentation. The face page explanation of the documents, including the Additional Documents, included in a package, the index of documents, separation pages between documents and dual page numbering (as described in paragraph 17) all ensure that investors will not be confused about what documentation they are receiving.

19. Granting the Requested Relief will enable Blackmont and other Dealers to provide their investor clients with consolidated reporting on all of the trades placed by the investor on a given day that is being requested by the investors. In their meetings with, and in periodic feedback to, Broadridge, Blackmont and other Dealers have advised Broadridge that their clients have expressed a strong desire to receive customized, relevant and consolidated reporting of this nature.

20. Broadridge will keep records of the Dealers that use the Smart Prospectus® Service with respect to Additional Documents and will forward, on a confidential basis, a list of the Dealers relying on this Decision to the Principal Regulator on a quarterly basis within 10 business days of the end of each calendar quarter.

Decision

Each of the Decision Makers is satisfied that the test contained in the Legislation that provides the Decision Maker with the jurisdiction to make the decision has been met.

The decision of the Decision Makers under the Legislation is that the Requested Relief is granted provided that:

(a) A Dealer relying on this relief uses the Smart Prospectus® Service pursuant to a contract with Broadridge the terms of which are consistent with the terms of this decision;

(b) with respect to the documents delivered by the Smart Prospectus® Service on behalf of a Dealer:

  (i) if the pages of a document delivered under the Smart Prospectus® Service have two page numbers, one will relate to the page number in the filed prospectus or Additional Document, as applicable, and the second will identify a consecutive page number in the Smart Prospectus® Service document, which pagination system is explained to the reader on the front of the Smart Prospectus® Service document;

  (ii) Additional Documents, when bound or attached together with a simplified prospectus relating to the purchase of a mutual fund security, shall be in the order of the documents listed in the related cover letter;

  (iii) the simplified prospectus delivered or sent to an investor otherwise complies with the terms of the First Decision; and

(c) this decision shall cease to be of effect with the coming into force of any legislation or rule of the Decision Makers relating to the preparation, delivery, binding or ordering of disclosure documents of mutual funds subject to this decision.

“Rhonda Goldberg”
Manager, Investment Funds Branch
Ontario Securities Commission

2.2 Orders

2.2.1 HSBC Bank Canada

IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, c. S.5, AS AMENDED

AND

IN THE MATTER OF
HSBC BANK CANADA

ORDER

WHEREAS on December 18, 2009, the Ontario Securities Commission (the "Commission") issued a Notice of Hearing pursuant to sections 127 and 127.1 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Act") in relation to HSBC Bank Canada ("HSBC");

AND WHEREAS HSBC entered into a settlement agreement with Staff of the Commission ("Staff") dated December 16, 2009 attached hereto as Appendix "A" (the "Settlement Agreement") in which it agreed to a settlement of the proceeding commenced by the Notice of Hearing dated December 18, 2009, subject to the approval of the Commission;

AND UPON reviewing the Settlement Agreement, and upon hearing submissions from counsel for Staff and HSBC;

AND WHEREAS the Commission is of the opinion that it is in the public interest to make this Order;

IT IS ORDERED THAT:

1. The Settlement Agreement is approved;

2. HSBC shall submit to a review of its compliance practices and procedures in accordance with the Terms of Reference attached at Schedule "B" to the Settlement Agreement;

3. HSBC pay to the Commission the sum of $5,925,000, to be allocated under section 3.4(2)(b) of the Act to or for the benefit of third parties; and

4. HSBC pay the costs of the Commission's investigation in the amount of $75,000.

DATED at Toronto this 21st day of December, 2009.

"James E.A. Turner"

"Mary G. Condon"

APPENDIX "A"

IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, c. S.5, AS AMENDED

AND

IN THE MATTER OF
HSBC BANK CANADA

SETTLEMENT AGREEMENT

PART I – INTRODUCTION

1. The Ontario Securities Commission (the "Commission") will issue a Notice of Hearing to announce that it will hold a hearing to consider whether, pursuant to section 127 and section 127.1 of the *Securities Act*, R.S.O. 1990, c. S-5, as amended (the "Act"), it is in the public interest for the Commission to make certain orders in respect of HSBC Bank Canada ("HSBC").

PART II – JOINT SETTLEMENT RECOMMENDATION

2. Staff of the Commission ("Staff") agree to recommend settlement of the proceeding commenced by Notice of Hearing dated December 18, 2009 (the "Proceeding") against HSBC according to the terms and conditions set out in Part IV of this Settlement Agreement. HSBC agrees to the making of an order in the form attached as Schedule "A", based on the facts set out below.

PART III – AGREED FACTS

3. HSBC admits the facts set out in this Settlement Agreement solely for the purposes of this Settlement Agreement. This Settlement Agreement and the facts and admissions set out herein are without prejudice to HSBC in any proceeding including, without limitation, any civil, administrative, quasi-criminal or criminal actions or proceedings that may be brought by any person or agency, whether or not this Settlement Agreement is approved by the Commission.

OVERVIEW

4. HSBC is a bank listed on Schedule II of the *Bank Act* (Canada). Its head office is located in Vancouver, British Columbia and its money market treasury function is located in Toronto, Ontario. HSBC is not a registrant under the Act.

5. On August 13, 2007, the Canadian non-bank sponsored asset-backed commercial paper ("ABCP" or "third-party ABCP") market froze, leaving Canadian investors holding illiquid investments that they could neither sell nor redeem.

6. HSBC was an agent for issuers in the third-party ABCP market. In that capacity, HSBC bought and sold third party ABCP.

ASSET-BACKED COMMERCIAL PAPER

7. ABCP is a short-term debt instrument with typical maturities of 30 to 180 days. ABCP is backed by a pool of underlying assets and offers a yield slightly better than the yield offered on short-term government debt.

8. ABCP is issued by a special purpose vehicle (also referred to as a conduit). In Canada, the conduits are trusts established by sponsors. Sponsors generally select underlying assets, administer the assets and arrange for the sale of the ABCP notes. The Canadian ABCP market included two categories: bank-sponsored and non-bank-sponsored (or third party) ABCP.

9. As the underlying assets held by conduits were long-term and the ABCP notes were short-term, there was a timing mismatch between the cash flowing from the assets and the cash needed to repay maturing ABCP. For many years, conduits met their maturity obligations by selling newly issued ABCP, the proceeds of which were used to pay maturing ABCP. The liquidity of ABCP was an important characteristic for investors along with credit ratings and yields.

10. To safeguard against difficulty meeting maturity obligations, conduits entered into agreements with liquidity providers which provided credit lines under certain conditions. In general, there were two types of liquidity facilities: (1) general

market disruption ("GMD") and (2) global-style. GMD liquidity was also called "Canadian-style" since it was only available in the Canadian ABCP market. Unlike global-style liquidity facilities, Canadian-style liquidity facilities required specified "general market disruption" events and a credit rating affirmation before liquidity was provided.

11. Liquidity agreements were subject to confidentiality provisions. Many details of the pre-conditions required for liquidity support, including the definition of a "general market disruption event", were not known to the public, investors or to the distributors of ABCP who were not also liquidity providers. Conduits generally disclosed the existence of their liquidity arrangements and disclosed that there were pre-conditions to draws.

12. As of September 2005, ABCP distributed in Canada was prospectus-exempt under the short-term debt exemption in section 2.35 of National Instrument 45-106 – *Prospectus and Registration Exemptions*, which provided an exemption for commercial paper with an approved credit rating from an approved credit rating organization. The conduits issuing the ABCP were not reporting issuers under applicable securities laws.

13. Dominion Bond Rating Services Limited ("DBRS"), an approved credit rating organization, was the sole credit rating organization which rated third-party ABCP in Canada.

14. On January 19, 2007, DBRS announced changes to its rating methodology for certain new transactions entered into by ABCP issuers. The DBRS press release set out specific new rating criteria, including a requirement for global-style liquidity, to be applied prospectively in the marketplace.

THIRD-PARTY ABCP

15. ABCP has been in the Canadian marketplace for over a decade, and non-bank sponsors entered the marketplace in approximately 2000.

16. Historically, the assets underlying ABCP consisted of traditional assets such as consumer loans, credit card receivables and residential mortgages. Non-traditional complex synthetic assets, such as collateralized debt obligations, came into these structures over time.

17. Third-party ABCP was typically issued by a series of notes, the most common being Series "A" Notes and Series "E" Notes. The "A" Notes were supported by the Canadian-style liquidity facilities. "E" Notes were not, but could be extended up to 364 days after the original maturity date if certain conditions were met, including that market conditions did not allow for "E" Notes to be sold at a specified spread.

18. The sponsors provided limited information regarding the underlying pool of assets in conduits issuing ABCP. Sponsors typically provided an information memorandum describing the basic elements of ABCP. In most cases, the general asset classes were the only information publicly disclosed; there was no disclosure of the specific assets held in the conduits or the terms of the liquidity agreements supporting the ABCP.

COVENTREE INC.

19. At all material times, Coventree Inc. was the largest sponsor of third-party ABCP in Canada. Coventree Inc. also issued third-party ABCP through a subsidiary, Nereus Financial Inc. ("Nereus").

20. At all material times, Coventree Inc. and Nereus (collectively, "Coventree") sponsored the following third-party ABCP conduits: Apollo Trust, Aurora Trust, Comet Trust, Gemini Trust, Planet Trust, Rocket Trust, Slate Trust, Venus Trust, Structured Investment Trust III and Structured Asset Trust.

21. All Coventree conduits but one received an R1-(high) rating (the highest credit rating available, equivalent to a "AAA" for long term debt) by DBRS, as did other Canadian third-party ABCP. This rating remained in place at all material times up to and including August 13, 2007. Coventree ABCP was rated by DBRS above the minimum "approved credit rating" required by NI 45-106 at all material times.

DISTRIBUTION OF THIRD-PARTY ABCP

22. In general, third-party ABCP was distributed to investors through a dealer group (the "dealer syndicate"). Typically, one member of the dealer syndicate would be appointed as lead dealer. Some of the lead dealer's daily duties included the allocation of ABCP notes to dealer syndicate members and setting the yield in consultation with the conduit sponsor.

23. The dealer syndicate members maintained trading lines, up to a credit limit, for third-party ABCP mainly to provide a market-making function. Dealer syndicate members would typically purchase third-party ABCP that was not sold at the end of a trading day. These positions were to be held on a short-term basis, typically overnight, until the notes could be

sold to investors. Dealer syndicate members also purchased third-party ABCP from clients in the secondary market. While the dealer syndicate was under no obligation to purchase any third-party ABCP, they did so to provide a secondary market, maintain liquidity in the market and/or as a service to their clients. Dealer syndicate members other than the lead dealer also had the option to turn back ABCP to the lead dealer if they were unable to sell their daily allocation, but this was not their ordinary practice.

24. Third-party ABCP traded in a dealer market, also known as an over-the-counter ("OTC") market. Unlike an auction market or exchange, the OTC market did not have a centralized quotation system and/or a centralized repository containing disclosure information that investors could access independently.

25. The primary information that dealers disclosed to investors was the name, yield, term and credit rating of third-party ABCP.

THE MARKET FREEZE

26. On August 13, 2007, a number of Canadian third-party ABCP conduits including the Coventree conduits were unable to sell new ABCP to fund the repayment of maturing ABCP. Many of the conduits' liquidity providers did not agree that the conditions for liquidity funding had occurred and refused to provide liquidity to the affected conduits.

27. As of August 13, 2007, the third-party ABCP market totalled approximately $35 billion, with Coventree conduits representing approximately 46 percent of the value of the third-party ABCP market.

28. On August 16, 2007, a consortium representing banks, asset providers and major ABCP holders agreed to take steps to establish normal operations in the ABCP market. This agreement was known as the Montreal Proposal.

29. A Pan-Canadian Investors Committee, including investors who were signatories to the Montreal Proposal plus other significant holders, was established to oversee the restructuring of third-party ABCP. It put forward the Plan of Compromise and Arrangement (the "Plan"), which was implemented on January 21, 2009.

30. Pursuant to the Plan, holders of the eligible third-party ABCP had their short-term notes exchanged for longer term notes to match more closely the maturity dates of the underlying assets. These new notes were issued by Master Asset Vehicles ("MAVs"). It is not currently possible to determine if any or all of the notes of the MAVs will mature at par value.

HSBC'S ROLE IN SELLING THIRD PARTY ABCP

31. HSBC first started selling third-party ABCP around 2002. HSBC sold ABCP to investors pursuant to a registration exemption found in section 4.1 of OSC Rule 45-501 – *Ontario Prospectus and Registration Exemptions*, which is available to HSBC as a financial intermediary.

32. Over time, HSBC took on various roles in the third-party ABCP market. When the market froze on August 13, 2007, HSBC's activities in respect of third-party ABCP included acting as:

    (a) a financial market intermediary, dealing in third-party ABCP conduits available in the market; and

    (b) a liquidity provider for reference assets in two Coventree conduits, namely Rocket Trust and Gemini Trust.

33. HSBC sold third-party ABCP primarily to institutional investors.

EMERGING ISSUES

(a) US Subprime Exposure

34. During the period from March to June, 2007, increasing defaults in US subprime mortgages started to place strains on credit markets in the United States.

35. Prior to July 24, 2007, HSBC received information from Coventree about third-party ABCP on the following occasions:

    (a) HSBC and some of its clients were among the ABCP investors and other market participants who attended a Coventree investor presentation in late April 2007. At that presentation, Coventree covered a number of topics, including disclosing that the overall US subprime exposure in its conduits was 7.4 percent and that all assets remained enhanced to AAA and were performing as expected.

(b) In early July 2007, one of HSBC's clients who had investments in ABCP made an enquiry with HSBC about a media article concerning the US subprime situation. HSBC approached Coventree for further information in response to this client enquiry. On July 6, 2007, Coventree sent an email to HSBC with an attachment detailing Coventree's US subprime exposure by conduit as at February 28, 2007. Although the attachment showed that the aggregate US subprime exposure in Coventree conduits was 7.39 percent, the Comet, Planet and Slate conduits were revealed to have elevated exposure to US subprime at 15.8, 19.1 and 21.3 percent respectively. Coventree also indicated that all deals remained enhanced to AAA level, and that all of the subprime deals were done prior to 2006. A Coventree representative stated in the email that the attached information could be forwarded to ABCP investors by HSBC.

(c) On July 9, 2007, Coventree sent a subsequent email to HSBC as an update to its July 6, 2007 email detailing Coventree's US subprime exposure by conduit and note series as of June 29, 2007. Although the email showed that the aggregate US subprime exposure was at 7 percent, the Comet E, Planet A and Slate E note series were shown to have higher levels of exposure at 41, 30 and 22 percent respectively.

36. On July 24, 2007, Coventree sent an email (the "July 24th email") to all of Coventree's syndicate members, including HSBC, setting out information regarding US subprime exposure in Coventree conduits as of June 28, 2007 and indicating the following:

(a) low loss levels;

(b) that subprime deal vintages were focused in pre-2006 vintages; and

(c) that all assets were performing as expected and remained at AAA level.

37. The July 24th email stated that "[a]t Coventree we are committed to furnishing our investors and dealer partners with the information they need to continue to support us through market cycles."

38. The July 24th email listed the US subprime exposure in each of the conduits as follows:

Conduits	Series A	Series E	Total ABCP
Aurora Trust	0%	8%	3%
Comet Trust	0%	42%	16%
Planet Trust	26%	3%	17%
Slate Trust	0%	16%	13%
Apollo Trust Gemini Trust Rocket Trust Venus Trust	0%	0%	0%
SAT	0%	0%	0%
SIT III	1%	0%	1%
TOTAL	3%	6%	5%

39. Coventree did not put any limitations on disclosure of the information contained in the July 24th email.

40. The information communicated by Coventree to HSBC on the occasions noted above was not verifiable by HSBC through publicly available sources. The publicly available DBRS rating remained unchanged throughout the period that HSBC received the communications from Coventree. HSBC did not disclose the information it received from Coventree to its Coventree-sponsored ABCP investor clients.

(b) Liquidity Issues

41. Beginning on July 30, 2007, HSBC became aware of certain factors that, in the aggregate, suggested there were liquidity issues affecting the third-party ABCP market:

(a) from July 30, 2007, spreads began to widen on third-party ABCP and continued to widen until August 13, 2007;

(b) on July 30, 2007, HSBC learned that other dealers were turning back unsold third-party ABCP to the lead dealer;

(c) on August 1, 2007, one client declined to roll $53 million of Coventree Planet "A" ABCP (although that client subsequently rolled $19.3 million of Aurora "E" and $15.4 million of Rocket "E" ABCP on August 3, 2007);

(d) on August 2, 2007, HSBC first learned that another dealer was no longer bidding on third-party ABCP;

(e) on August 7, 2007, HSBC learned that one of the Coventree dealer syndicate members had recently resigned from the dealer syndicate;

(f) on August 7, 2007, HSBC learned that the third-party ABCP market was experiencing pressure because of an issuance of new bank-sponsored ABCP into the market on August 3, 2007; and

(g) on August 8, 2007, HSBC learned that another dealer was no longer bidding on third party ABCP.

42. In addition to the foregoing factors HSBC:

(a) declined to provide bids for third-party ABCP in the secondary market beginning on August 8, 2007;

(b) returned unsold third-party ABCP to the lead dealer; and

(c) examined the provisions of its liquidity agreements with Coventree, and the pre-conditions to payment, and began to monitor daily movement within the ABCP market.

43. By August 8, 2007, HSBC was aware that liquidity issues were affecting the entire third-party ABCP market.

HSBC'S RESPONSE TO EMERGING ISSUES

44. HSBC did not inform Compliance of the emerging issues in the third-party ABCP market prior to the market freeze. As a result, there was a delay in engaging appropriate processes for assessing the impact of emerging issues in the third-party ABCP market.

45. More generally, prior to the market freeze HSBC did not conduct new product review with respect to third-party ABCP, nor changes to ABCP. Furthermore, HSBC did not provide formal training to its sales representatives concerning the ABCP product.

46. HSBC continued to sell third-party ABCP:

(a) with exposure to US subprime, from July 25 to August 10, 2007; and

(b) despite the liquidity issues described above, after August 8, 2007.

47. During those periods, HSBC sold $172 million to clients who may not have been aware of those issues, $2.6 million of which came from HSBC's inventory (excluding sales of ABCP that matured prior to August 13, 2007).

48. Prior to July 2007, HSBC's inventory fluctuated with the demand for third-party ABCP between $8.8 million and $89.4 million.

49. As at August 13, 2007, HSBC held for its own account $52 million in frozen third-party ABCP.

HSBC'S ADMISSION

50. Between July 25 and August 13, 2007, HSBC engaged in conduct contrary to the public interest by failing to adequately respond to emerging issues in the third-party ABCP market insofar as it continued to sell third-party ABCP without engaging compliance and other appropriate processes for the assessment of such information and concerns.

HSBC'S POSITION

51. Throughout the crisis, HSBC supported the preservation and then the restructuring of the non-bank ABCP market through actions such as the following:

(a) its participation in the Montreal Proposal;

(b) upon being advised that the liquidity draw requests for Coventree Rocket and Gemini liquidity agreements had been pre-empted by the Montreal Accord, HSBC began negotiations to purchase assets from the relevant Coventree conduits in exchange for cash, and those transactions closed in due course.

52. HSBC fully cooperated with the joint regulatory investigation of Coventree at its own significant expense.

PART IV – TERMS OF SETTLEMENT

53. HSBC agrees to the terms of settlement listed below.

54. The Commission will make an order pursuant to section 127(1) and section 127.1 of the Act that:

(a) the Settlement Agreement is approved;

(b) HSBC shall submit to a review of its compliance practices and procedures in accordance with the Terms of Reference attached at Schedule "B";

(c) HSBC pay to the Commission the sum of $5,925,000, to be allocated under s. 3.4(2)(b) of the Act to or for the benefit of third parties; and

(d) HSBC pay the costs of the Commission's investigation in the amount of $75,000.

55. HSBC agrees to personally make any payments ordered above by immediately available funds when the Commission approves this Settlement Agreement. HSBC will not be reimbursed for, or receive a contribution toward, this payment from any other person or company.

PART V – STAFF COMMITMENT

56. If the Commission approves this Settlement Agreement, Staff, the Investment Industry Regulatory Organization of Canada and Autorité des marchés financiers will not commence any proceeding against the Respondent or any of its affiliates or their respective present or former directors, officers, employees or agents in relation to the facts set out in Part III of this Settlement Agreement, subject to the provisions of paragraph 57 below.

57. If the Commission approves this Settlement Agreement and HSBC fails to comply with any of the terms of the Settlement Agreement, Staff may bring proceedings under Ontario securities law against HSBC. These proceedings may be based on, but are not limited to, the facts set out in Part III of this Settlement Agreement as well as the breach of the Settlement Agreement.

PART VI – PROCEDURE FOR APPROVAL OF SETTLEMENT

58. The parties will seek approval of this Settlement Agreement at a public hearing before the Commission scheduled for December 21, 2009, or on another date agreed to by Staff and HSBC, according to the procedures set out in this Settlement Agreement and the Commission's Rules of Practice.

59. Staff and HSBC agree that this Settlement Agreement will form all of the agreed facts that will be submitted at the settlement hearing on HSBC's conduct, unless the parties agree that additional facts should be submitted at the settlement hearing.

60. If the Commission approves this Settlement Agreement, HSBC agrees to waive all rights to a full hearing, judicial review or appeal of this matter under the Act.

61. If the Commission approves this Settlement Agreement, neither party will make any public statement that is inconsistent with this Settlement Agreement or with any additional agreed facts submitted at the settlement hearing.

62. Whether or not the Commission approves this Settlement Agreement, HSBC will not use, in any proceeding, this Settlement Agreement or the negotiation or process of approval of this agreement as the basis for any attack on the Commission's jurisdiction, alleged bias, alleged unfairness, or any other remedies or challenges that may otherwise be available.

PART VII – DISCLOSURE OF SETTLEMENT AGREEMENT

63. If the Commission does not approve this Settlement Agreement or does not make the order attached as Schedule "A" to this Settlement Agreement:

i. this Settlement Agreement and all discussions and negotiations between Staff and HSBC before the settlement hearing takes place will be without prejudice to Staff and HSBC; and

ii. Staff and HSBC will each be entitled to all available proceedings, remedies and challenges. Any proceedings, remedies and challenges will not be affected by this Settlement Agreement, or by any discussions or negotiations relating to this agreement.

64. Both parties will keep the terms of the Settlement Agreement confidential until the Commission approves the Settlement Agreement. At that time, the parties will no longer have to maintain confidentiality. If the Commission does not approve the Settlement Agreement, both parties must continue to keep the terms of the Settlement Agreement confidential, unless they agree in writing not to do so or if required by law.

PART VIII – EXECUTION OF SETTLEMENT AGREEMENT

65. The parties may sign separate copies of this agreement. Together, these signed copies will form a binding agreement.

66. A fax copy of any signature will be treated as an original signature.

Dated this 16th day of December, 2009

HSBC BANK CANADA

By: "J. Lindsay Gordon"
Name: J. Lindsay Gordon
Title: Chief Executive Officer

STAFF OF THE ONTARIO SECURITIES COMMISSION

By: "Kathryn Daniels"
Name: Kathryn Daniels
Title: Deputy Director, Enforcement

SCHEDULE "A"

IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, c. S.5, AS AMENDED

AND

IN THE MATTER OF
HSBC BANK CANADA

ORDER

WHEREAS on December ?, 2009, the Ontario Securities Commission (the "Commission") issued a Notice of Hearing pursuant to sections 127 and 127.1 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Act") in relation to HSBC Bank Canada ("HSBC");

AND WHEREAS HSBC entered into a settlement agreement with Staff of the Commission ("Staff") dated December 16, 2009 (the "Settlement Agreement") in which it agreed to a settlement of the proceeding commenced by the Notice of Hearing dated December ●, 2009, subject to the approval of the Commission;

AND UPON reviewing the Settlement Agreement, and upon hearing submissions from counsel for Staff and HSBC;

AND WHEREAS the Commission is of the opinion that it is in the public interest to make this Order;

IT IS ORDERED THAT:

1. The Settlement Agreement is approved;

2. HSBC shall submit to a review of its compliance practices and procedures in accordance with the Terms of Reference attached at Schedule "B" to the Settlement Agreement;

3. HSBC pay to the Commission the sum of $5,925,000, to be allocated under section 3.4(2)(b) of the Act to or for the benefit of third parties; and

4. HSBC pay the costs of the Commission's investigation in the amount of $75,000.

DATED at Toronto this day of December, 2009.

_____ _____

_____

SCHEDULE "B"

TERMS OF REFERENCE FOR COMPLIANCE REVIEW

A. Retention of the Consultant

1. The Consultant's reasonable compensation and expenses shall be borne exclusively by HSBC Bank Canada (the "Respondent").

2. The agreement with the Consultant ("Agreement") shall provide that the Consultant examine the policies, procedures and effectiveness of:

   a. the Respondent's compliance and oversight functions concerning its trading and sales within the fixed income department;

   b. any committees or other mechanisms established to review and approve new fixed income securities products and changes to those products;

   c. the Respondent's training of its staff concerning new fixed income securities products and changes to those products;

   d. the Respondent's training of its staff concerning the escalation of issues to compliance and engaging other appropriate processes;

   (collectively, the "Review").

B. The Consultant's Reporting Obligations

1. The Consultant shall issue a draft report to the Respondent within 3 months of appointment and in that regard will be provided the opportunity to present its report to the Board of Directors of the Respondent.

2. The Consultant shall engage with the Respondent in discussions regarding the draft report with a view to reaching consensus and finalizing the report within 1 month of the delivery of the draft report. If requested by the Consultant, the Consultant will be provided with an opportunity to present its final report to the Board of Directors of the Respondent, and may explain any areas of disagreement with management of the Respondent.

3. The Consultant will deliver the final report to the Respondent.

4. Staff with prior notice may attend at the premises of the Respondent and review the draft and final versions of the Consultant's report.

5. The Consultant's draft and final reports shall include a description of the review performed, the conclusions reached, and the Consultant's recommendations for any changes or improvements to the Respondent's policies and procedures as the Consultant reasonably deems necessary to conform to regulatory requirements.

6. The Respondent will, within 60 days after receipt of the Consultant's report, advise Staff of the OSC ("OSC Staff") of a timetable to implement the recommendations contained in the report; however, in the event the Respondent disagrees with any of the recommendations, the Respondent shall so advise OSC Staff and provide to the Consultant reasons for such position and, if applicable, any alternative actions, policies or procedures the Respondent intends to adopt.

7. Staff may attend at the premises of the Respondent and may review the Consultant's report with respect to the implementation of the Consultant's recommendations.

8. The Respondent shall certify to the OSC, by certificate executed on its behalf by each of the CEO, the CCO and the Chair of the Board of Directors of the Respondent, that the Respondent has implemented those recommendations of the Consultant which it had agreed upon, and will do so promptly following such implementation.

9. For greater certainty, the terms of this compliance review do not limit in any respect the authority of the OSC to undertake, as part of their normal course audit activities, a review of all matters within the scope of the Review or any other aspect of the business of the Respondent.

C. Terms of the Consultant's Retention

1. The appointment of the Consultant shall be made promptly following the approval of the Settlement Agreement, but in any event by no later than January 31, 2010, by mutual agreement between the Respondent and OSC Staff.

2. The Consultant shall have reasonable access to all of the Respondent's books and records and the ability to meet privately with the Respondent's personnel. The Respondent shall instruct and otherwise encourage its officers, directors, and employees to cooperate fully with the review conducted by the Consultant, and inform its officers, directors, and employees that failure to cooperate with the Review may be grounds for disciplinary action.

3. The Consultant shall have the right, as reasonable and necessary in his or her judgment, to retain, at the Respondent's expense, lawyers, accountants, and other persons or firms, other than officers, directors, or employees of the Respondent, to assist in the discharge of the Consultant's obligations. The Respondent shall pay all reasonable fees and expenses (as reasonably documented) of any persons or firms retained by the Consultant.

4. The Consultant shall make and keep notes of interviews conducted, and keep a copy of documents gathered, in connection with the performance of his or her responsibilities.

2.2.2 Canadian Imperial Bank of Commerce and CIBC World Markets Inc.

IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, c. S.5, AS AMENDED

AND

IN THE MATTER OF
CANADIAN IMPERIAL BANK OF COMMERCE
AND CIBC WORLD MARKETS INC.

ORDER

WHEREAS on December 18, 2009, the Ontario Securities Commission (the "Commission") issued a Notice of Hearing pursuant to sections 127 and 127.1 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Act") in relation to Canadian Imperial Bank of Commerce and CIBC World Markets Inc. (together, "CIBC");

AND WHEREAS CIBC and Staff of the Commission ("Staff") entered into a settlement agreement dated December 16, 2009 attached hereto as Appendix "A" (the "Settlement Agreement") in which they agreed to a settlement of the proceeding commenced by the Notice of Hearing dated December 18, 2009, subject to the approval of the Commission;

AND UPON reviewing the Settlement Agreement, and upon hearing submissions from counsel for Staff and CIBC;

AND WHEREAS the Commission is of the opinion that it is in the public interest to make this Order;

IT IS ORDERED THAT:

1. The Settlement Agreement is approved;

2. CIBC shall submit to a review of its compliance practices and procedures in accordance with the Terms of Reference attached at Schedule "B" to the Settlement Agreement;

3. CIBC pay to the Commission the sum of $21.7 million, to be allocated under section 3.4(2)(b) of the Act to or for the benefit of third parties; and

4. CIBC pay the costs of the Commission's investigation in the amount of $300,000.

DATED at Toronto this 21st day of December, 2009.

"James E.A. Turner"

"Mary G. Condon"

APPENDIX "A"

**IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, c. S.5, AS AMENDED**

AND

**IN THE MATTER OF
CANADIAN IMPERIAL BANK OF COMMERCE
AND CIBC WORLD MARKETS INC.**

SETTLEMENT AGREEMENT

PART I – INTRODUCTION

1. The Ontario Securities Commission (the "Commission") will issue a Notice of Hearing to announce that it will hold a hearing to consider whether, pursuant to section 127 and section 127.1 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Act"), it is in the public interest for the Commission to make certain orders in respect of Canadian Imperial Bank of Commerce and CIBC World Markets Inc. (together, "CIBC").

PART II – JOINT SETTLEMENT RECOMMENDATION

2. Staff of the Commission ("Staff") agree to recommend settlement of the proceeding commenced by Notice of Hearing dated December 18, 2009 (the "Proceeding") against CIBC according to the terms and conditions set out in Part IV of this Settlement Agreement. CIBC agrees to the making of an order in the form attached as Schedule "A", based on the facts set out below.

PART III – AGREED FACTS

3. CIBC admits the facts set out in this Settlement Agreement solely for the purposes of this Settlement Agreement. This Settlement Agreement and the facts and admissions set out herein are without prejudice to CIBC in any proceeding including, without limitation, any civil, administrative, quasi-criminal or criminal actions or proceedings that may be brought by any person or agency, whether or not this Settlement Agreement is approved by the Commission.

OVERVIEW

4. Canadian Imperial Bank of Commerce is a bank listed on Schedule I of the *Bank Act* (Canada). Its head office is located in Toronto, Ontario. CIBC World Markets Inc. is a corporation incorporated under the laws of the Province of Ontario. It is a wholly owned subsidiary of CIBC. Its head office is also located in Toronto, Ontario.

5. On August 13, 2007, the Canadian non-bank sponsored asset-backed commercial paper ("ABCP" or "third-party ABCP") market froze, leaving Canadian investors holding illiquid investments that they could neither sell nor redeem.

6. CIBC was an agent for issuers in the third-party ABCP market. In that capacity, CIBC bought and sold third-party ABCP.

ASSET-BACKED COMMERCIAL PAPER

7. ABCP is a short-term debt instrument with typical maturities of 30 to 180 days. ABCP is backed by a pool of underlying assets and offers a yield slightly better than the yield offered on short-term government debt.

8. ABCP is issued by a special purpose vehicle (also referred to as a conduit). In Canada, ABCP is issued by trusts established by sponsors. Sponsors generally select underlying assets, administer the assets and arrange for the sale of the ABCP notes. The Canadian ABCP market included two categories: bank-sponsored and non-bank-sponsored (or third party) ABCP.

9. As the underlying assets held by conduits were long-term and the ABCP notes were short-term, there was a timing mismatch between the cash flowing from the assets and the cash needed to repay maturing ABCP. For many years, conduits met their maturity obligations by selling newly issued ABCP, the proceeds of which were used to pay maturing ABCP. The liquidity of ABCP was an important characteristic for investors along with credit ratings and yields.

10. To safeguard against difficulty meeting maturity obligations, conduits entered into agreements with liquidity providers which provided credit lines under certain conditions. In general, there were two types of liquidity facilities: (1) general market disruption ("GMD") and (2) global-style. GMD liquidity was also called "Canadian-style" since it was only available in the Canadian ABCP market. Unlike global-style liquidity facilities, Canadian-style liquidity facilities required specified "general market disruption" events and a credit rating affirmation before liquidity was provided.

11. Liquidity agreements were subject to confidentiality provisions. Many details of the pre-conditions required for liquidity support, including the definition of a "general market disruption event", were not known to the public, investors or to the distributors of ABCP who were not also liquidity providers. Conduits generally disclosed the existence of their liquidity arrangements and disclosed that there were pre-conditions to draws.

12. In Ontario, as of September 14, 2005, pursuant to National Instrument 45-106 – *Prospectus and Registration Exemptions*, the issuance and sale of commercial paper, including ABCP, was exempt from the requirements to deliver a prospectus, provided that such commercial paper matured not more than one year from the date of issue and had an "approved credit rating" from an "approved credit rating organization".

13. The conduits issuing the ABCP were not reporting issuers under applicable securities laws and were not required to engage in continuous disclosure under Canadian securities laws.

14. Dominion Bond Rating Services Limited ("DBRS"), an approved credit rating organization, was the sole credit rating organization which rated third-party ABCP in Canada. To this end, DBRS had access to the following information regarding third-party ABCP: the details of the structure, the underlying assets and the liquidity agreements.

15. On January 19, 2007, DBRS announced changes to its rating methodology for certain new transactions entered into by ABCP issuers. The DBRS press release set out specific new rating criteria, including a requirement for global-style liquidity, to be applied prospectively in the marketplace.

THIRD-PARTY ABCP

16. ABCP has been in the Canadian marketplace for over a decade, and non-bank sponsors entered the marketplace in approximately 2000.

17. Historically, the assets underlying ABCP consisted of traditional assets such as consumer loans, credit card receivables and residential mortgages. Non-traditional complex synthetic assets, such as collateralized debt obligations, came into these structures over time.

18. Third-party ABCP was typically issued by a series of notes, the most common being Series "A" Notes and Series "E" Notes. The "A" Notes were supported by the Canadian-style liquidity facilities. "E" Notes were not supported by liquidity facilities, but could be extended up to 364 days after the original maturity date if certain conditions were met, including that market conditions did not allow for "E" Notes to be sold at a specified spread.

19. The sponsors provided limited information regarding the underlying pool of assets in conduits issuing ABCP. Sponsors typically provided an information memorandum describing the basic elements of ABCP. In most cases, the general asset classes were the only information publicly disclosed; there was no disclosure of the specific assets held in the conduits or the terms of the liquidity agreements supporting the ABCP.

COVENTREE INC.

20. At all material times, Coventree Inc. was the largest sponsor of third-party ABCP in Canada. Coventree Inc. also issued third-party ABCP through a subsidiary, Nereus Financial Inc. ("Nereus").

21. At all material times, Coventree Inc. and Nereus (collectively, "Coventree") sponsored the following third-party ABCP conduits: Apollo Trust, Aurora Trust, Comet Trust, Gemini Trust, Planet Trust, Rocket Trust, Slate Trust, Venus Trust, Structured Investment Trust III and Structured Asset Trust.

22. All Coventree conduits but one received an R1-(high) rating (the highest credit rating available, equivalent to a "AAA" for long term debt) by DBRS, as did other Canadian third-party ABCP. This rating remained in place at all material times up to and including August 13, 2007. Coventree ABCP was rated by DBRS above the minimum "approved credit rating" required by NI 45-106 at all material times.

DISTRIBUTION OF THIRD-PARTY ABCP

23. In general, third-party ABCP was distributed to investors through a dealer group (the "dealer syndicate"). Typically, one member of the dealer syndicate would be appointed as lead dealer. Some of the lead dealer's daily duties included the allocation of ABCP notes to dealer syndicate members and setting the yield in consultation with the conduit sponsor.

24. The dealer syndicate members maintained trading lines, up to a credit limit, for third-party ABCP mainly to provide a market-making function. Dealer syndicate members would typically purchase third-party ABCP that was not sold at the end of a trading day. These positions were to be held on a short-term basis, typically overnight, until the notes could be sold to investors. Dealer syndicate members also purchased third-party ABCP from investors in the secondary market. While the dealer syndicate was under no obligation to purchase any third-party ABCP, they did so to provide a secondary market, maintain liquidity in the market and/or as a service to investors. Dealer syndicate members other than the lead dealer also had the option to turn back ABCP to the lead dealer if they were unable to sell their daily allocation, but this was not their ordinary practice.

25. Third-party ABCP traded in a dealer market, also known as an over-the-counter ("OTC") market. Unlike an auction market or exchange, the OTC market did not have a centralized quotation system and/or a centralized repository containing disclosure information that investors could access independently.

26. The primary information that dealers disclosed to investors was the name, yield, term and credit rating of third-party ABCP.

THE MARKET FREEZE

27. On August 13, 2007, a number of Canadian third-party ABCP conduits including the Coventree conduits were unable to sell new ABCP to fund the repayment of maturing ABCP. Many of the conduits' liquidity providers did not agree that the conditions for liquidity funding had occurred and refused to provide liquidity to the affected conduits.

28. As of August 13, 2007, the third-party ABCP market totalled approximately $35 billion, with Coventree conduits representing approximately 46 percent of the value of the third-party ABCP market.

29. On August 16, 2007, a consortium representing banks, asset providers and major ABCP holders agreed to take steps to establish normal operations in the ABCP market. This agreement was known as the Montreal Proposal.

30. A Pan-Canadian Investors Committee, including investors who were signatories to the Montreal Proposal plus other significant holders, was established to oversee the restructuring of third-party ABCP. It put forward the Plan of Compromise and Arrangement (the "Plan"), which was implemented on January 21, 2009.

31. Pursuant to the Plan, holders of the eligible third-party ABCP had their short-term notes exchanged for longer term notes to match more closely the maturity dates of the underlying assets. These new notes were issued by Master Asset Vehicles ("MAVs"). It is not currently possible to determine if any or all of the notes of the MAVs will mature at par value.

CIBC'S ROLE IN SELLING THIRD PARTY ABCP

32. CIBC first started selling third-party ABCP around 2000. CIBC sold ABCP to investors pursuant to a registration exemption found in section 4.1 of OSC Rule 45-501 – *Ontario Prospectus and Registration Exemptions*¸ which is available to CIBC as a financial intermediary, and pursuant to an exemption order made in favour of CIBC by the Ontario Securities Commission on October 23, 2006.

33. CIBC sold third-party ABCP to corporations and institutional investors through its Money Market Desk.

EMERGING ISSUES

(a) US Subprime Exposure

34. During the period from March to June, 2007, increasing defaults in US subprime mortgages started to place strains on credit markets in the United States.

35. Prior to July 24, 2007, CIBC had obtained some subprime information about third-party ABCP on the following occasions:

(a) Two representatives of CIBC, some ABCP investors that purchased through CIBC and other market participants attended a Coventree investor presentation in late April 2007. At that presentation, Coventree covered a number of topics, including disclosing that the overall US subprime exposure in its conduits was 7.4 percent and that all assets remained enhanced to AAA and were performing as expected.

(b) In mid-March 2007, CIBC obtained some information respecting US subprime exposure for third-party ABCP conduits from the lead dealer on behalf of a third party ABCP investor.

36. On July 24, 2007, a third-party ABCP investor sold $100 million of its non-Coventree third-party ABCP prior to maturity to CIBC.

37. Later on July 24, 2007, Coventree sent an email (the "July 24th email") to all of Coventree's syndicate members, including CIBC, setting out information regarding US subprime exposure in Coventree conduits as of June 28, 2007 and indicating the following:

(a) low loss levels;

(b) that subprime deal vintages were focused in pre-2006 vintages; and

(c) that all assets were performing as expected and remained at AAA level.

38. The July 24th email stated that "[a]t Coventree we are committed to furnishing our investors and dealer partners with the information they need to continue to support us through market cycles."

39. The July 24th email listed the US subprime exposure in each of the conduits as follows:

Conduits	Series A	Series E	Total ABCP
Aurora Trust	0%	8%	3%
Comet Trust	0%	42%	16%
Planet Trust	26%	3%	17%
Slate Trust	0%	16%	13%
Apollo Trust Gemini Trust Rocket Trust Venus Trust	0%	0%	0%
SAT	0%	0%	0%
SIT III	1%	0%	1%
TOTAL	3%	6%	5%

40. The information communicated in the July 24th email by Coventree was not verifiable by CIBC through publicly available sources. In order to understand the information and its context, CIBC contacted Coventree to seek further information, and was advised by Coventree that all of the information contained in the July 24th email was known to DBRS.

41. Coventree advised that it was not going to generally disclose the July 24th email to investors but did not prohibit the disclosure of the information contained in the July 24th email and advised that CIBC could use its judgment in disclosing the information.

42. The July 24th email was disseminated to certain staff at both the bank and dealer.

43. On July 24, 2007, CIBC Risk Management initiated a review of all credit limits for commercial paper. While this review was in progress, CIBC Risk Management instructed the Money Market Desk to temporarily refrain from buying Coventree-sponsored ABCP until the Risk Management review was complete. When CIBC Risk Management's review was complete on July 26, 2007, credit limits were adjusted downward from prior limits. Historically, those credit limits were not fully utilized.

44. Between July 25 and August 1, 2007, CIBC-sponsored conduits allowed Coventree-sponsored ABCP to mature without rolling into new ABCP.

45. CIBC disclosed the information contained in the July 24th email to at least two investors. It did not generally disclose the information to Coventree-sponsored ABCP investors that purchased through CIBC.

(b) Liquidity Issues

46. CIBC became aware, starting on July 30, 2007, that spreads were beginning to widen on third-party ABCP and those spreads continued to widen until August 13, 2007.

47. CIBC was also aware that two investors were reducing their exposure to third-party ABCP by declining to roll third-party ABCP. In addition, CIBC declined to provide bids for all "E" Notes as of July 30, 2007. Further, CIBC began to return unsold third-party ABCP to the lead dealer.

48. By August 3, 2007, CIBC was concerned that liquidity issues may affect the third-party ABCP market more generally.

CIBC'S RESPONSE TO EMERGING ISSUES

49. CIBC continued to sell Coventree and certain other third-party ABCP from July 25 to August 3, 2007. During that period, CIBC sold $245 million to investors who may not have been aware of those issues, $22 million of which came from CIBC's inventory (excluding sales of ABCP that matured prior to August 13, 2007).

50. On Friday, August 3, 2007, the Money Market Desk learned from Coventree's lead dealer that Coventree would likely be unable to fund its maturing ABCP upon the resumption of the market on Tuesday, August 7, 2007 (after a long weekend). This was the first time that CIBC received information indicating a likelihood of default by a third-party ABCP sponsor.

51. Given the new information received on Friday, August 3, 2007, CIBC became concerned about the possibility of a market disruption in Coventree ABCP occurring during the following week. Over the long weekend that followed, appropriate senior management of CIBC were advised of the emerging issues and assessed the risks to holders and prospective purchasers of Coventree ABCP. CIBC notified the Bank of Canada of its concerns on two occasions that weekend. During the long weekend, CIBC decided that it would no longer offer Coventree-sponsored ABCP for sale when the market reopened on Tuesday, August 7, 2007.

52. In the period from August 7, 2007 to August 13, 2007, while the third-party ABCP market continued functioning, CIBC did not sell, or offer to sell, any Coventree ABCP.

53. On August 13, 2007, ten days after CIBC stopped selling third-party ABCP, the third-party ABCP market froze.

54. As at August 13, 2007, CIBC held for its own account $358 million in frozen third-party ABCP.

55. CIBC did not inform senior management or compliance of the emerging issues in the third-party ABCP market prior to Saturday, August 4, 2007. As a result, there was a delay in engaging appropriate processes for assessing the impact of emerging issues in the third-party ABCP market.

56. More generally, CIBC did not conduct new product review with respect to third-party ABCP, nor changes to ABCP. In addition, CIBC did not provide formal training to its sales representatives concerning the third-party ABCP product.

CIBC'S ADMISSION

57. Between July 25 and August 3, 2007, CIBC engaged in conduct contrary to the public interest by failing to adequately respond to emerging issues in the third-party ABCP market insofar as it continued to sell third-party ABCP without engaging compliance and other appropriate processes for the assessment of such information and concerns.

CIBC'S POSITION

58. CIBC participated in the Montreal Proposal, an agreement among market participants to protect investor value in the third-party ABCP market, which was an essential first step in the restructuring process approved by the Ontario Superior Court of Justice under the Companies' Creditors Arrangement Act (Canada). CIBC contributed approximately $300 million in liquidity lines to help make the Plan financially viable.

59. CIBC fully cooperated with the joint regulatory investigation at its own expense.

PART IV – TERMS OF SETTLEMENT

60. CIBC agrees to the terms of settlement listed below.

61. The Commission will make an order pursuant to section 127(1) and section 127.1 of the Act that:

    (a) The Settlement Agreement is approved;

    (b) CIBC shall submit to a review of its compliance practices and procedures in accordance with the Terms of Reference attached at Schedule "B";

    (c) CIBC pay to the Commission the sum of $21.7 million, to be allocated under s. 3.4(2)(b) of the Act to or for the benefit of third parties; and

    (d) CIBC pay the costs of the Commission's investigation in the amount of $300,000.

62. CIBC agrees to personally make any payments ordered above through immediately available funds when the Commission approves this Settlement Agreement. CIBC will not be reimbursed for, or receive a contribution toward, this payment from any other person or company.

PART V – STAFF COMMITMENT

63. If the Commission approves this Settlement Agreement, Staff, the Investment Industry Regulatory Organization of Canada and Autorité des marchés financiers will not commence any proceeding against the Respondent or any of its affiliates or their respective present or former directors, officers, employees or agents in relation to the facts set out in Part III of this Settlement Agreement, subject to the provisions of paragraph 64 below.

64. If the Commission approves this Settlement Agreement and CIBC fails to comply with any of the terms of the Settlement Agreement, Staff may bring proceedings under Ontario securities law against CIBC. These proceedings may be based on, but are not limited to, the facts set out in Part III of this Settlement Agreement as well as the breach of the Settlement Agreement.

PART VI – PROCEDURE FOR APPROVAL OF SETTLEMENT

65. The parties will seek approval of this Settlement Agreement at a public hearing before the Commission scheduled for December 21, 2009 or on another date agreed to by Staff and CIBC, according to the procedures set out in this Settlement Agreement and the Commission's Rules of Practice.

66. Staff and CIBC agree that this Settlement Agreement will form all of the agreed facts that will be submitted at the settlement hearing on CIBC's conduct, unless the parties agree that additional facts should be submitted at the settlement hearing.

67. If the Commission approves this Settlement Agreement, CIBC agrees to waive all rights to a full hearing, judicial review or appeal of this matter under the Act.

68. If the Commission approves this Settlement Agreement, neither party will make any public statement that is inconsistent with this Settlement Agreement or with any additional agreed facts submitted at the settlement hearing.

69. Whether or not the Commission approves this Settlement Agreement, CIBC will not use, in any proceeding, this Settlement Agreement or the negotiation or process of approval of this agreement as the basis for any attack on the Commission's jurisdiction, alleged bias, alleged unfairness, or any other remedies or challenges that may otherwise be available.

PART VII – DISCLOSURE OF SETTLEMENT AGREEMENT

70. If the Commission does not approve this Settlement Agreement or does not make the order attached as Schedule "A" to this Settlement Agreement:

    i. this Settlement Agreement and all discussions and negotiations between Staff and CIBC before the settlement hearing takes place will be without prejudice to Staff and CIBC; and

ii. Staff and CIBC will each be entitled to all available proceedings, remedies and challenges. Any proceedings, remedies and challenges will not be affected by this Settlement Agreement, or by any discussions or negotiations relating to this agreement.

71. Both parties will keep the terms of the Settlement Agreement confidential until the Commission approves the Settlement Agreement. At that time, the parties will no longer have to maintain confidentiality. If the Commission does not approve the Settlement Agreement, both parties must continue to keep the terms of the Settlement Agreement confidential, unless they agree in writing not to do so or if required by law.

PART VIII – EXECUTION OF SETTLEMENT AGREEMENT

72. The parties may sign separate copies of this agreement. Together, these signed copies will form a binding agreement.

73. A fax copy of any signature will be treated as an original signature.

Dated this 16th day of December, 2009

CANADIAN IMPERIAL BANK OF COMMERCE

By : "Charles W. Gerber"
Name: Charles W. Gerber
Title: Senior Vice President

CIBC WORLD MARKETS INC.

By: "Robert J. Richardson"
Name: Robert J. Richardson
Title: Vice President & Director

STAFF OF THE ONTARIO SECURITIES COMMISSION

By: "Kathryn Daniels"
Name: Kathryn Daniels
Title: Deputy Director, Enforcement

SCHEDULE "A"

IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, c. S.5, AS AMENDED

AND

IN THE MATTER OF
CANADIAN IMPERIAL BANK OF COMMERCE
AND CIBC WORLD MARKETS INC.

ORDER

WHEREAS on December ●, 2009, the Ontario Securities Commission (the "Commission") issued a Notice of Hearing pursuant to sections 127 and 127.1 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Act") in relation to Canadian Imperial Bank of Commerce and CIBC World Markets Inc. (together, "CIBC");

AND WHEREAS CIBC and Staff of the Commission ("Staff") entered into a settlement agreement dated December 16, 2009 (the "Settlement Agreement") in which they agreed to a settlement of the proceeding commenced by the Notice of Hearing dated December ?, 2009, subject to the approval of the Commission;

AND UPON reviewing the Settlement Agreement, and upon hearing submissions from counsel for Staff and CIBC;

AND WHEREAS the Commission is of the opinion that it is in the public interest to make this Order;

IT IS ORDERED THAT:

1. The Settlement Agreement is approved;

2. CIBC shall submit to a review of its compliance practices and procedures in accordance with the Terms of Reference attached at Schedule "B" to the Settlement Agreement;

3. CIBC pay to the Commission the sum of $21.7 million, to be allocated under section 3.4(2)(b) of the Act to or for the benefit of third parties; and

4. CIBC pay the costs of the Commission's investigation in the amount of $300,000.

DATED at Toronto this day of December, 2009.

_____ _____

_____

SCHEDULE "B"

TERMS OF REFERENCE FOR COMPLIANCE REVIEW

A. Retention of the Consultant

1. The Consultant's reasonable compensation and expenses shall be borne exclusively by Canadian Imperial Bank of Commerce and CIBC World Markets Inc. (the "Respondent").

2. The agreement with the Consultant ("Agreement") shall provide that the Consultant examine the policies, procedures and effectiveness of:

   a. the Respondent's compliance and oversight functions concerning its trading and sales within the fixed income department;

   b. any committees or other mechanisms established to review and approve new fixed income securities products and changes to those products;

   c. the Respondent's training of its staff concerning new fixed income securities products and changes to those products;

   d. the Respondent's training of its staff concerning the escalation of issues to compliance and engaging other appropriate processes;

   e. limitations on disclosure of material non-public information and confidential information as between the Respondents, and the Respondents' training of their staff regarding same.

   (collectively, the "Review").

B. The Consultant's Reporting Obligations

1. The Consultant shall issue a draft report to the Respondent within 3 months of appointment and in that regard will be provided the opportunity to present its report to the Board of Directors of the Respondent.

2. The Consultant shall engage with the Respondent in discussions regarding the draft report with a view to reaching consensus and finalizing the report within 1 month of the delivery of the draft report. If requested by the Consultant, the Consultant will be provided with an opportunity to present its final report to the Board of Directors of the Respondent, and may explain any areas of disagreement with management of the Respondent.

3. The Consultant will deliver the final report to the Respondent.

4. Staff with prior notice may attend at the premises of the Respondent and review the draft and final versions of the Consultant's report.

5. The Consultant's draft and final reports shall include a description of the review performed, the conclusions reached, and the Consultant's recommendations for any changes or improvements to the Respondent's policies and procedures as the Consultant reasonably deems necessary to conform to regulatory requirements.

6. The Respondent will, within 60 days after receipt of the Consultant's report, advise the Staff of the OSC ("OSC Staff") of a timetable to implement the recommendations contained in the report; however, in the event the Respondent disagrees with any of the recommendations, the Respondent shall so advise OSC Staff and provide to the Consultant reasons for such position and, if applicable, any alternative actions, policies or procedures the Respondent intends to adopt.

7. Staff may attend at the premises of the Respondent and may review the Consultant's report with respect to the implementation of the Consultant's recommendations.

8. The Respondent shall certify to the OSC, by certificate executed on its behalf by each of the CEO, the UDP, the CCO and the Chair of the Board of Directors of the Respondent, that the Respondent has implemented

those recommendations of the Consultant which it had agreed upon, and will do so promptly following such implementation.

9. For greater certainty, the terms of this compliance review do not limit in any respect the authority of the OSC to undertake, as part of its normal course audit activities, a review of all matters within the scope of the Review or any other aspect of the business of the Respondent.

C. Terms of the Consultant's Retention

1. The appointment of the Consultant shall be made promptly following the approval of the Settlement Agreement, but in any event by no later than January 31, 2010, by mutual agreement between the Respondent and OSC Staff.

2. The Consultant shall have reasonable access to all of the Respondent's books and records and the ability to meet privately with the Respondent's personnel. The Respondent shall instruct and otherwise encourage its officers, directors, and employees to cooperate fully with the review conducted by the Consultant, and inform its officers, directors, and employees that failure to cooperate with the Review may be grounds for disciplinary action.

3. The Consultant shall have the right, as reasonable and necessary in his or her judgment, to retain, at the Respondent's expense, lawyers, accountants, and other persons or firms, other than officers, directors, or employees of the Respondent, to assist in the discharge of the Consultant's obligations. The Respondent shall pay all reasonable fees and expenses (as reasonably documented) of any persons or firms retained by the Consultant.

4. The Consultant shall make and keep notes of interviews conducted, and keep a copy of documents gathered, in connection with the performance of his or her responsibilities.

2.2.3 Roger D. Rowan et al.

**IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, c. S.5, AS AMENDED**

AND

**IN THE MATTER OF
ROGER D. ROWAN, WATT CARMICHAEL INC.,
HARRY J. CARMICHAEL AND
G. MICHAEL McKENNEY**

ORDER

WHEREAS on July 28, 2006, the Commission issued a Notice of Hearing pursuant to sections 127 and 127.1 of the *Securities Act* (the "Act") in relation to a Statement of Allegations issued by Staff of the Commission ("Staff") on that date against Roger D. Rowan ("Rowan"), Harry J Carmichael ("Carmichael"), G. Michael McKenney ("McKenney") and Watt Carmichael Inc. ("Watt Carmichael") (collectively, the "Respondents") and Eugene N. Melnyk ("Melnyk");

AND WHEREAS on June 5, 2007, an Amended Statement of Allegations was issued by Staff in which the allegations against Melnyk were withdrawn. The reason for the withdrawal was that, on May 18, 2007, the Commission approved a Settlement Agreement between Staff and Melnyk, who had originally been named as a respondent in this proceeding;

AND WHEREAS the Commission conducted the hearing on the merits in this matter on June 18-22, 26-28 and September 6-7, 2007;

AND WHEREAS the Commission issued its decision and reasons on the merits on June 20, 2008 (the "Merits Decision");

AND WHEREAS the Commission is satisfied that the Respondents have breached Ontario securities law and their conduct was contrary to the public interest, as outlined in the Merits Decision;

AND WHEREAS the Commission conducted a hearing with respect to sanctions and costs on April 29-30, 2009;

AND WHEREAS the Commission is of the opinion that it is in the public interest to order sanctions against the Respondents;

AND WHEREAS the Commission is of the opinion that an order for costs pursuant to section 127.1 of the Act is appropriate;

IT IS HEREBY ORDERED:

With respect to Rowan:

(a) his registration is suspended for a period of 12 months pursuant to section 127(1)1 of the Act;

(b) at the conclusion of his suspension of registration, his registration shall be subject to a condition that he not be approved to act in any supervisory role for a further period of 18 months pursuant to section 127(1)1 of the Act;

(c) he is required to resign any position that he currently holds as a director or officer of a reporting issuer or registrant pursuant to sections 127(1)7 and 127(1)8.1 of the Act;

(d) he is prohibited from becoming or acting as a director or officer of a reporting issuer or an affiliate of a reporting issuer for a period of 7 years pursuant to section 127(1)8 of the Act;

(e) he is prohibited from becoming or acting as a director or officer of a registrant for a period of 3 years pursuant to section 127(1)8.2 of the Act;

(f) he is reprimanded pursuant to section 127(1)6 of the Act;

(g) he shall pay an administrative penalty pursuant to section 127(1)9 of the Act in the amount of $520,000, to be allocated by the Commission to or for the benefit of third parties pursuant to section 3.4(2)(b) of the Act.

With respect to Carmichael:

(a) he is required to resign any position that he currently holds as a director or officer of a registrant pursuant to section 127(1)8.1 of the Act;

(b) he is prohibited from becoming or acting as a director or officer of a registrant for a period of 45 days pursuant to section 127(1)8.2 of the Act;

(c) a condition is imposed on his registration pursuant to section 127(1)1 of the Act that he not be approved to act in any supervisory role for a period of 45 days;

(d) he is reprimanded pursuant to section 127(1)6 of the Act; and

(e) he shall pay an administrative penalty pursuant to section 127(1)9 of the Act in the amount of $250,000, to be allocated by the Commission to or for the benefit of third parties pursuant to section 3.4(2)(b) of the Act.

With respect to McKenney:

(a) he is required to resign any position that he currently holds as a director or officer of a registrant pursuant to section 127(1)8.1 of the Act;

(b) he is prohibited from becoming or acting as a director or officer of a registrant for a period of 12 months pursuant to section 127(1)8.2 of the Act;

(c) a condition is imposed on his registration pursuant to section 127(1)1 of the Act that he not be approved to act in any supervisory role for a period of 12 months; and

(d) he is reprimanded pursuant to section 127(1)6 of the Act.

With respect to Watt Carmichael:

(a) it is required to undergo an independent review of its compliance structure as well as its procedures relating to the handling of confidential information and conflicts of interest pursuant to section 127(1)4 of the Act. This review should encompass the following points:

(i) it is to be conducted by an independent party approved by Staff;

(ii) it is to be conducted at the expense of Watt Carmichael;

(iii) it is required to implement any changes recommended by the expert within reasonable times frames set out by the expert after consultation with Watt Carmichael and Staff; and

(iv) Watt Carmichael is to provide Staff with a copy of the report and recommendations of the expert and with progress reports concerning the implementation of the report's recommendations;

(b) it is reprimanded pursuant to section 127(1)6 of the Act; and

(c) it shall pay an administrative penalty in the amount of $450,000 pursuant to section 127(1)9 of the Act, to be allocated by the Commission to or for the benefit of third parties pursuant to section 3.4(2)(b) of the Act.

On the issue of costs:

(a) pursuant to subsection 127.1(2) of the Act, the Respondents shall jointly and severally pay to the Commission $140,000 in costs and disbursements.

Dated at Toronto, Ontario this 21st day of December 2009.

"Patrick J. LeSage"

"Suresh Thakrar"

"David L. Knight"

2.2.4 McLaren Resources Inc. – s. 144

IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, c. S.5, AS AMENDED
(the "Act")

AND

IN THE MATTER OF
MCLAREN RESOURCES INC.

ORDER
(Section 144)

WHEREAS on February 4, 2009, McLaren Resources Inc. (the "Filer") and its transfer agent were notified that the Director of the Ontario Securities Commission (the "Commission") made an order under paragraph 2 and paragraph 2.1 of subsection 127(1) and subsection 127(5) of the Act that all trading in and all acquisitions of the securities of the Filer, whether direct or indirect, cease immediately for a period of fifteen days from the date of the order (the "Temporary Order");

AND WHEREAS the Temporary Order was made because the Filer failed to file certain disclosure materials required under Ontario securities laws and shortly thereafter on February 17, 2009, the Director made an order under paragraph 2 and paragraph 2.1 of subsection 127(1) of the Act (the "Permanent Order") that all trading in and acquisitions of the securities of Filer whether direct or indirect, cease until the Permanent Order is revoked by the Director (the Temporary Order and Permanent Order will be collectively referred to herein as the "Cease Trade Order");

AND WHEREAS the Filer has applied to the Commission for an order pursuant to section 144 of the Act revoking the Cease Trade Order;

AND WHEREAS the Filer has represented to the Commission that:

1. The Filer was incorporated under the laws of the Province of Ontario on July 13, 1999.

2. The Filer became a reporting issuer in Ontario on January 11, 2000. The Filer's head office is located in Toronto, Ontario. The Filer is not a reporting issuer or the equivalent thereof in any other jurisdiction.

3. The Filer is engaged in the business of international petroleum exploration and development primarily in the Dutch sector of the North Sea and continued operating in the normal course of business throughout the Cease Trade Order.

4. As at the date hereof, the authorized capital of the Filer consists of an unlimited number of common shares of which 18,944,281 are issued and outstanding.

5. Other than the Cease Trade Order the Filer has not previously been subject to a cease trade order.

6. The Cease Trade Order was issued as a result of the Filer's failure to file, in accordance with the requirements of Ontario securities law, annual financial statements for the year ended September 30, 2008 (the "**Annual Financial Statements**"); the related Management Discussion and Analysis (the "**Annual MD&A**") for the year ended September 30, 2008 and corresponding certificates under National Instrument 52-109 – *Certification of Disclosure in Issuer's Annual and Interim Filings* for the year ended September 30, 2009 (the "**NI 52-109 Certificates**").

7. The Filer filed the Annual Financial Statements, the Annual MD&A and NI 52-109 Certificates on June 24, 2009 and July 31, 2009 respectively.

8. The Filer also failed to file with the Commission in accordance with the requirements of Ontario securities laws:

   a. the Filer's interim financial statements for the three months ended December 31, 2008 and 2007 (the "**December 2008 and 2007 Interim Financial Statements**"), together with the Filer's management discussion and analysis for the three months ended December 31, 2008 and 2007 (the "**December 2008 and 2007 Interim MD&A**") and the corresponding NI 52-109 Certificates; and

   b. the Filer's interim financial statements for the six months ended June 30, 2008 and 2007 (the "**June 2008 and 2007 Interim Financial Statements**"), together with the Filer's management discussion and analysis for the six months ended June 30, 2008 and 2007 (the "**June 2008 and 2007 Interim MD&A**") and the corresponding NI 52-109 Certificates.

9. On August 4, 2009, the Filer filed with the Commission the December 2008 and 2007 Interim Financial Statements, the December 2008 and 2007 Interim MD&A and the corresponding NI 52-109 Certificates.

10. On August 26, 2009, the Filer filed with the Commission the June 2008 and 2007 Interim Financial Statements, the June 2008 and 2007 Interim MD&A and the corresponding NI 52-109 Certificates.

11. The Filer failed to file the above noted disclosure documents in a timely matter because of an ongoing dispute among the board of directors as to the general direction of the Filer and the

composition of its management team. As disclosed in a press release dated March 12, 2009, at a meeting lawfully called by dissident shareholders on March 10, 2009, a new slate of directors were elected. The Filer no longer has a divided board.

12. Other than the Cease Trade Order, the Filer is not in default of its continuous disclosure obligations under Ontario securities law, including the rules and regulations made thereunder, and has paid all outstanding fees to the Commission, including all applicable activity and participation fees and late filing fees.

13. The Filer has provided the Commission with an undertaking pursuant to section 3.1(5) of National Policy 12-202 – *Revocation of Compliance-related Cease Trade Order* that it will hold its annual meeting within three months after the date in which the Cease Trade Order is revoked.

14. The Filer expects to deliver its annual financial statements for the year ended September 30, 2009; the related Management Discussion and Analysis for the year ended September 30, 2009 and corresponding certificates under NI 52-109 with a copy of its upcoming management information circular to be mailed to shareholders of the Filer in connection with its 2009 annual meeting.

15. As of the date of this Order, there exists no material facts concerning the Filer which have not been disclosed to the shareholders of the Filer and to the Commission.

16. The Filer is not considering, nor is it involved in any discussion relating to a reverse take-over, merger, amalgamation or other form of combination or transaction similar to any of the foregoing.

17. Following the revocation of the Cease Trade Order, the Filer intends to raise capital to fund a strategic arrangement with Canadian Imperial Venture Corp. and Shoal Point Energy Limited to pursue exploration and production opportunities in the Green Point Formation located in Western Newfoundland, as more particularly described in the press release filed on SEDAR on December 4, 2009 by the Filer.

18. The Filer's issuer profiles on SEDAR and SEDI are up-to-date.

19. Upon the issuance of this revocation order, the Filer will issue a news release and file a material change report on SEDAR.

AND UPON considering the application and the recommendation of the staff of the Commission;

AND UPON the Director being satisfied that the Filer has remedied its defaults in respect in respect of the filing requirements under the Act;

AND UPON the Director being satisfied that to revoke the Cease Trade Order would not be prejudicial to the public interest;

IT IS ORDERED, pursuant to section 144 of the Act that the Cease Trade Order is revoked.

DATED at Toronto this 18th day of December, 2009.

"Jo-Anne Matear"
Assistant Manager, Corporate Finance
Ontario Securities Commission

2.2.5 Barry Landen – s. 127

IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, c. S.5, AS AMENDED

AND

IN THE MATTER OF
BARRY LANDEN

ORDER
(Section 127 of the Securities Act)

WHEREAS on October 7, 2009, the Commission issued a Notice of Hearing pursuant to section 127 of the Act accompanied by a Statement of Allegations dated October 6, 2009, issued by Staff of the Commission ("Staff") with respect to Barry Landen ("Landen");

AND WHEREAS on October 7, 2009, counsel for Landen was served with the Notice of Hearing and Statement of Allegations;

AND WHEREAS the Notice of Hearing set the hearing in this matter for October 29, 2009 at 10:00 a.m.;

AND WHEREAS on October 26, 2009, the Commission adjourned the hearing at the request of counsel for Staff and counsel for Landen to November 10, 2009 at 2:30 p.m. for the purpose of having a pre-hearing conference;

AND WHEREAS on November 10, 2009, the pre-hearing conference was commenced in front of the Commission and adjourned on consent of all parties until December 23, 2009;

AND WHEREAS on December 23, 2009, counsel for Staff and counsel for Landen have requested that the pre-hearing conference be adjourned from December 23, 2009 until January 8, 2010 at 2:00 p.m.;

IT IS ORDERED THAT the hearing is adjourned to January 8, 2010 at 2:00 p.m. or such other date as is agreed by the parties and determined by the Office of the Secretary for the purpose of continuing the pre-hearing conference.

DATED at Toronto this 23rd day of December, 2009.

"David L. Knight"

2.2.6 Rezwealth Financial Services Inc. et al. – ss. 127(1), 127(5)

IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, c. S.5, AS AMENDED

AND

IN THE MATTER OF
REZWEALTH FINANCIAL SERVICES INC.,
PAMELA RAMOUTAR, CHRIS RAMOUTAR,
JUSTIN RAMOUTAR, TIFFIN FINANCIAL
CORPORATION, DANIEL TIFFIN,
2150129 ONTARIO INC. and SYLVAN BLACKETT

TEMPORARY ORDER
Sections 127(1) & 127(5)

WHEREAS it appears to the Ontario Securities Commission (the "Commission") that:

1. Rezwealth Financial Services Inc. ("Rezwealth") is a corporation registered in the Province of Ontario;

2. Tiffin Financial Corporation ("Tiffin Financial") is a corporation registered in the Province of Ontario;

3. 2150129 Ontario Inc. ("215 Inc.") is a corporation registered in the Province of Ontario;

4. Rezwealth, Tiffin Financial and 215 Inc. (together, the "Corporate Respondents") are not registered with the Commission in any capacity;

5. Pamela Teresa Ramoutar ("Pamela") is a director and officer of Rezwealth and has been identified as the directing mind of Rezwealth;

6. Chris Ramoutar ("Chris") is a director and officer of Rezwealth;

7. Justin Ramoutar ("Justin") is a director and officer of Rezwealth;

8. Daniel E. Tiffin ("Tiffin") is the sole director of Tiffin Financial;

9. Sylvan Blackett ("Blackett") is the sole director of 215 Inc.;

10. Pamela, Chris, Justin, Tiffin and Blackett (together, the "Individual Respondents") are not registered with the Commission in any capacity;

11. Tiffin Financial, Tiffin, Pamela and Justin have been soliciting investors to provide funds to Rezwealth for investment;

12. Ontario investors have provided funds to Rezwealth for investment;

13. Chris, Blackett and 215 Inc. have received investor funds from Rezwealth, the purpose for which is unknown;

14. Staff of the Commission are conducting an investigation into the activities of the Corporate Respondents and the Individual Respondents;

15. The Commission is of the opinion that the time required to conclude a hearing could be prejudicial to the public interest; and

16. The Commission is of the opinion that it is in the public interest to make this order;

AND WHEREAS by Commission order made August 31, 2009 pursuant to section 3.5(3) of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Act") any one of W. David Wilson, James E.A. Turner, David L. Knight, Carol S. Perry, Patrick J. LeSage, James D. Carnwarth and Mary G. Condon, acting alone, is authorized to make orders under section 127 of the Act;

IT IS ORDERED pursuant to clause 2 of subsection 127(1) and subsection 127(5) of the Act that all trading in any securities by Rezwealth, Tiffin Financial and 215 Inc., or their agents or employees shall cease;

IT IS FURTHER ORDERED pursuant to clause 2 of subsection 127(1) and subsection 127(5) of the Act that all trading in any securities by Pamela, Chris, Justin, Tiffin and Blackett shall cease;

IT IS FURTHER ORDERED pursuant to clause 3 of subsection 127(1) and subsection 127(5) of the Act that the exemptions contained in Ontario securities law do not apply to Rezwealth, Tiffin Financial and 215 Inc. or their agents or employees;

IT IS FURTHER ORDERED pursuant to clause 3 of subsection 127(1) and subsection 127(5) of the Act that the exemptions contained in Ontario securities law do not apply to Pamela, Chris, Justin, Tiffin and Blackett; and

IT IS FURTHER ORDERED pursuant to subsection 127(6) of the Act that this order shall take effect immediately and shall expire on the fifteenth day after its making unless extended by order of the Commission.

Dated at Toronto this 22nd day of December, 2009

"W. David Wilson"

2.2.7 Irwin Boock et al. – ss. 127, 127.1

[Publisher's note: This order, which originally appeared in (2009), 32 OSCB 10487, is being republished to correct an error in the date.]

IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, c. S.5, AS AMENDED

AND

IN THE MATTER OF
IRWIN BOOCK, STANTON DEFREITAS, JASON WONG, SAUDIA ALLIE, ALENA DUBINSKY, ALEX KHODJIAINTS, SELECT AMERICAN TRANSFER CO., LEASESMART, INC., ADVANCED GROWING SYSTEMS, INC., INTERNATIONAL ENERGY LTD., NUTRIONE CORPORATION, POCKETOP CORPORATION, ASIA TELECOM LTD., PHARM CONTROL LTD., CAMBRIDGE RESOURCES CORPORATION, COMPUSHARE TRANSFER CORPORATION, FEDERATED PURCHASER, INC., TCC INDUSTRIES, INC., FIRST NATIONAL ENTERTAINMENT CORPORATION, WGI HOLDINGS, INC. AND ENERBRITE TECHNOLOGIES GROUP

ORDER
(Section 127 and 127.1)

WHEREAS on October 16, 2008, the Commission commenced the within proceeding by issuing a Notice of Hearing pursuant to sections 127 and 127.1 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Act");

AND WHEREAS the hearing was adjourned from time to time until April 22, 2009 when the Commission ordered that the hearing of this matter on the merits was to be held on Monday, October 19, 2009 through to Friday, November 13, 2009, excluding Wednesday, November 11, 2009, commencing each day at 10:00 a.m. at the offices of the Commission on the 17th floor, 20 Queen Street West in Toronto;

AND WHEREAS on October 14, 2009 counsel for Stanton DeFreitas ("DeFreitas") attended before the Commission and requested that the hearing scheduled to commence on October 19, 2009 be adjourned for the purpose of bringing a motion to obtain further disclosure from Staff of the Commission;

AND WHEREAS on October 14, 2009 counsel for Staff of the Commission attended as did counsel for Irwin Boock ("Boock") and counsel for Jason Wong ("Wong");

AND WHEREAS on October 14, 2009 none of the other Respondents attended before the Commission nor did counsel for any of the other Respondents;

AND WHEREAS on October 14, 2009 counsel for Staff of the Commission did not oppose the adjournment

request of counsel for DeFreitas, nor did counsel for Boock or counsel for Wong;

AND WHEREAS the temporary orders made by the Commission on April 22, 2009 remain in place until the completion of the hearing on the merits of this matter;

AND WHEREAS on October 15th, 2009, the Commission ordered that the hearing of this matter on the merits which was to commence on Monday, October 19, 2009 be vacated and that the hearing be adjourned until December 1, 2009, or such other date as determined by the parties and the Secretary's office, for the purpose of setting dates for the hearing on the merits;

AND WHEREAS on November 30, 2009, the Commission ordered that the hearing be adjourned until December 10, 2009 to ascertain when to set dates for the hearing on the merits;

AND WHEREAS on December 10, 2009, counsel for Boock, DeFrietas, and Wong and counsel for Staff appeared before the Commission and made submissions regarding the scheduling of the hearing on the merits;

AND WHEREAS the Commission is of the opinion that it is in the public interest to make this Order;

IT IS ORDERED THAT the dates for the hearing of this matter on the merits shall commence on February 1, 2010 at 10:00 a.m. and shall continue for four weeks excluding the dates of February 2, 15 and 16 or such other dates as may be determined by the parties and the Office of the Secretary.

DATED at Toronto this 10th day of December, 2009.

"James E. A. Turner"

Chapter 3

Reasons: Decisions, Orders and Rulings

3.1 OSC Decisions, Orders and Rulings

3.1.1 Roger D. Rowan et al.

IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, c. S.5, AS AMENDED

AND

IN THE MATTER OF
ROGER D. ROWAN, WATT CARMICHAEL INC.,
HARRY J. CARMICHAEL AND
G. MICHAEL McKENNEY

REASONS AND DECISION ON SANCTIONS AND COSTS

Hearing:	April 29-30, 2009		
Decision:	December 21, 2009		
Panel:	Patrick J. LeSage, Q.C.	–	Commissioner (Chair of the Panel)
	Suresh Thakrar, FICB, ICD.D	–	Commissioner
	David L. Knight, FCA	–	Commissioner
Counsel:	Johanna Superina Alexandra Clark Usman Sheikh	–	for Staff of the Ontario Securities Commission
	Nigel Campbell Ryder Gilliland Prof. Peter Hogg	–	for Roger D. Rowan, Harry J. Carmichael, G. Michael McKenney, and Watt Carmichael Inc. (Respondents)
	S. Zachary Green	–	for The Attorney General of Ontario

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REASONS AND DECISION ON SANCTIONS AND COSTS

I. BACKGROUND

[1] This was a bifurcated hearing before the Ontario Securities Commission (the "Commission") pursuant to sections 127 and 127.1 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "Act"), to consider whether it is in the public interest to make an order with respect to sanctions and costs (the "Sanctions and Costs Hearing") against Roger D. Rowan ("Rowan"), Harry J. Carmichael ("Carmichael"), G. Michael McKenney ("McKenney") and Watt Carmichael Inc. ("Watt Carmichael") (collectively, the "Respondents").

[2] The hearing on the merits was held before the hearing panel (the "Hearing Panel") on June 18-22, 26-28 and September 6-7, 2007, and a decision was rendered on June 20, 2008 (Re Rowan (2008), 31 O.S.C.B. 6515 (the "Merits Decision")). The Sanctions and Costs Hearing was held on April 29-30, 2009.

[3] The individual respondents: Rowan who was the President and Chief Operating Officer ("COO") of Watt Carmichael; Carmichael who was the Chairman, Chief Executive Officer ("CEO") and also the Ultimate Designated Person ("UDP") of Watt Carmichael; and McKenney who was the Chief Compliance Officer ("CCO") and Chief Financial Officer ("CFO") of Watt Carmichael and Watt Carmichael, the corporate respondent (a broker and investment dealer registered under the Act), were all found by the Hearing Panel to have breached Ontario securities laws. The Hearing Panel found that the conduct of the Respondents was contrary to the public interest. The majority of the Hearing Panel found that four of the eight allegations had been proven by Staff.

[4] Staff of the Commission ("Staff') seeks sanctions against the Respondents which are set out below at paragraphs 15 to 18. In addition, Staff seeks costs as set out below at paragraph 20.

[5] The Respondents vigorously dispute the sanctions sought by Staff in this case. The Respondents also seek to challenge the constitutional validity of the administrative penalty provision of the Act, section 127(1)9 of the Act, which they claim infringes their rights under section 11 of the *Canadian Charter of Rights and Freedoms*, Part I of the Constitution Act, 1982, being Schedule B to the *Canada Act 1982* (U.K.) 1982, c. 11 (the "Charter").

[6] A Notice of Constitutional Question was delivered by the Respondents to the Attorney General of Ontario (the "Attorney General"). The Attorney General intervened in the proceeding to make submissions and to adduce evidence in response to the Notice of Constitutional Question.

[7] The Respondents also assert that Staff is seeking to apply the administrative penalty to their conduct retrospectively. The Respondents submit that the findings by the Hearing Panel relate to acts that originated prior to April 7, 2003, which is the date of the coming into force of the Commission's administrative penalty provision. Accordingly, they submit that the presumption against retrospectivity applies, and that this Panel cannot order the Respondents to pay an administrative penalty.

[8] These are our Reasons and Decision as to the appropriate sanctions and costs that should be ordered against the Respondents.

II. KEY FINDINGS IN MERITS DECISION

[9] This matter arose out of a Notice of Hearing issued by the Commission on July 28, 2006 in relation to a Statement of Allegations issued by Staff on that same date with respect to the Respondents and Eugene N. Melnyk ("Melnyk").

[10] On June 5, 2007, an Amended Statement of Allegations was issued by Staff which withdrew the allegations against Melnyk. The reason for the withdrawal was that, on May 18, 2007, the Commission approved a Settlement Agreement between Staff and Melnyk, who had originally been named as a respondent in this proceeding (the "Melnyk Settlement").

[11] The Amended Statement of Allegations raised the following allegations against the Respondents with respect to their activities in relation to the trading of Biovail securities held by certain trusts in 2002, 2003 and 2004:

(a) while an insider of Biovail, Rowan executed numerous trades in Biovail in the Congor, Conset and Southridge Accounts in 2002, 2003, and 2004 and failed to file any insider reports in respect of these trades contrary to subsection 107(2) of the Act;

(b) contrary to the public interest and contrary to Ontario securities law, Rowan failed to provide complete and accurate information to Biovail concerning the number of Biovail common shares over which he exercised control or direction. As a result, the disclosure contained in Biovail's management proxy circulars in 2002, 2003 and 2004 was misleading or untrue or did not state facts that were required to be stated or that were necessary to make the statements in the circulars not misleading;

(c) contrary to the public interest, Rowan engaged in discretionary trading of Biovail securities in the Conset, Congor and Southridge Accounts in 2002 and 2003 during each of the Biovail blackout periods;

(d) Rowan traded Biovail securities held in the Congor, Conset and Southridge Accounts at times when he had knowledge of material undisclosed information contained in Biovail management reports contrary to subsection 76(1) of the Act;

(e) Rowan purported to exercise discretionary trading authority in the Southridge Account when he did not have such discretionary authority, contrary to the Know Your Client requirements set out in subsection 1.5(1) of OSC Rule 31-505 – Conditions of Registration, (1999), 22 O.S.C.B. 731 and (2003), 26 O.S.C.B. 7170, referred to as the "Know Your Client" rule ("OSC Rule 31-505"), and contrary to the public interest;

(f) contrary to the public interest, Rowan and Watt Carmichael provided responses to the IDA's request for information as to the identity of the beneficiaries of the Congor and Conset Trusts which they knew or ought to have known were misleading or untrue or did not state facts that were required to be stated to make their statements not misleading;

(g) contrary to the public interest, Rowan made statements to Staff as to the identity of the beneficiaries of the Conset Trust which he knew or ought to have known were misleading or untrue or did not state facts that were required to be stated to make his statements not misleading; and

(h) contrary to the public interest, Watt Carmichael did not adequately supervise Rowan's trading in Biovail securities in the Congor, Conset and Southridge Accounts. Contrary to the public interest, Carmichael, in his capacity as Chairman and CEO, and McKenney, in his capacity as CCO, failed to adequately supervise trading by Rowan and to address conflicts of interest despite indications that supervision was required.

(Merits Decision, *supra* at para. 10)

[12] The majority of the Hearing Panel made the following findings in its Merits Decision:

(a) Rowan breached section 107 of the Act by failing to file insider reports in respect of trades in Biovail securities that he executed in the Trust Accounts;

(b) Rowan engaged in conduct contrary to the public interest by failing to disclose to Biovail the Biovail securities held in the Trust Accounts over which he exercised control or direction;

(c) Rowan engaged in conduct contrary to the public interest by trading in Biovail securities in the Trust Accounts during Biovail's Blackout Periods;

(d) Rowan did not breach section 76 of the Act;

(e) Rowan did not contravene OSC Rule 31-505 (Know Your Client) by conducting unauthorized discretionary trading in the Southridge Account;

(f) Rowan and Watt Carmichael did not mislead the IDA;

(g) Rowan did not mislead the Commission;

(h) McKenney, Carmichael and Watt Carmichael failed to adequately supervise Rowan's trading in Biovail securities in the Trust Accounts; and

(i) the conduct of the Respondents with regards to paragraphs (a), (b), (c) and (h) was contrary to the public interest.

(Merits Decision, *supra* at para. 354)

[13] We must consider the findings of the majority of the Hearing Panel carefully when determining the appropriate sanctions to impose on the Respondents in this case.

III. SANCTIONS REQUESTED BY STAFF

[14] In their submissions, Staff requested that the following orders be made against the Respondents.

Rowan

[15] With respect to Rowan:

(a) his registration should be suspended for a period of one to two years;

(b) at the conclusion of his suspension of registration, his registration should be subject to a condition that he not be approved or act in any supervisory role for a further period of 2 to 4 years;

(c) he should be required to resign any position that he currently holds as a director or officer of a reporting issuer or registrant;

(d) he should be prohibited from becoming or acting as a director or officer of a reporting issuer or an affiliate of a reporting issuer for a period of 8 to 10 years;

(e) he should be prohibited from becoming or acting as a director or officer of a registrant for a period of 3 to 5 years;

(f) he should receive a reprimand; and

(g) he should be required to pay an administrative penalty in the amount of $750,000 to $1,000,000.

Carmichael

[16] With respect to Carmichael:

(a) he should be required to resign any position that he currently holds as a director or officer of a registrant;

(b) he should be prohibited from becoming or acting as a director or officer of a registrant for a period of 6 to 12 months;

(c) he should have a condition imposed on his registration that he not be approved in or act in any supervisory role for a period of 6 to 12 months;

(d) he should receive a reprimand; and

(e) he should be required to pay an administrative penalty in the amount of $300,000 to $500,000.

McKenney

[17] With respect to McKenney:

(a) he should be required to resign any position that he currently holds as a director or officer of a registrant;

(b) he should be prohibited from becoming or acting as a director or officer of a registrant for a period of 6 to 12 months;

(c) he should have a condition imposed on his registration that he not be approved in or act in any supervisory role for a period of 6 to 12 months; and

(d) he should receive a reprimand.

Watt Carmichael

[18] With respect to Watt Carmichael:

(a) it should be required to undergo an independent review of its compliance structure as well as its procedures relating to the handling of confidential information and conflicts of interest. This review should encompass the following points:

(i) it should be conducted by an independent party approved by Staff;

(ii) it should be conducted at Watt Carmichael's expense;

(iii) Watt Carmichael should be required to implement any changes recommended by the expert within reasonable times frames set out by the expert after consultation with Watt Carmichael and Staff; and

(iv) Watt Carmichael should provide Staff with a copy of the report and recommendations of the expert and with progress reports concerning the implementation of the report's recommendations;

(b) it should receive a reprimand; and

(c) it should be required to pay an administrative penalty in the amount of $850,000 to $1,000,000.

[19] Staff argues that the requested sanctions are both proportionate and appropriate in light of the Respondents' serious breaches of Ontario securities law and their conduct contrary to the public interest.

[20] Staff is also requesting that the Respondents be ordered, on a joint and several basis, to pay a portion of the costs of the hearing on the merits amounting to $283,691.40.

IV. THE ISSUES

[21] The matter before us raises the following issues as we review the appropriate sanctions and costs against the Respondents:

A. Does section 11 of the Charter apply to proceedings when administrative penalties are sought under section 127(1)9 of the Act?

B. If the provision does not infringe the Charter, is Staff seeking to impose an administrative penalty retrospectively in this case?

C. What are the appropriate sanctions in this case?

D. What are the appropriate costs in this case?

V. ANALYSIS

A. Does Section 11 of the Charter Apply to Proceedings When Administrative Penalties are Sought Under Section 127(1)9 of the Act?

[22] We must consider whether the imposition of an administrative penalty pursuant to section 127(1)9 of the Act would be a violation of section 11 of the Charter.

i. Respondents' Submissions

[23] The Respondents challenge the constitutional validity of section 127(1)9 of the Act, which gives the Commission power to impose an administrative penalty of not more than $1,000,000 per breach of the Act. They argue that a penalty of such magnitude is a "true penal consequence" and brings into play section 11 of the Charter which deals with "Proceedings in Criminal and Penal Matters".

[24] The Respondents point out that the Supreme Court of Canada in *R. v. Wigglesworth*, [1987] 2 S.C.R. 541 (QL version) ("*Wigglesworth*") considered the breadth of section 11 of the Charter to those charged with an offence. At paragraph 21, Wilson J. established that there are two circumstances where "a matter could fall within s. 11 either because by its very nature it is a criminal proceeding or because a conviction in respect of the offence may lead to a true penal consequence".

[25] The Respondents submit that the administrative penalty provided for in section 127(1)9 (maximum $1 million for each failure to comply) is penal in nature, or at least a true penal consequence. Consequently, proceedings under section 127(1)9 are entitled to all the safeguards provided to an accused in a criminal or quasi-criminal proceeding, including protections under section 11 of the Charter.

[26] Professor Peter W. Hogg who made submissions regarding the constitutional validity of section 127(1)9 of the Act for the Respondents, puts it this way: that a $1 million administrative penalty for any regulatory violation, no matter what it may be called, is plainly and simply a "fine", and a very large fine at that. It is, he submits, "word play" to call it anything other than a fine. This is especially so with the legislation which not only has a $1 million maximum administrative penalty but provides for a $1 million administrative penalty for "each failure to comply". He says that this means the legislation permits Staff in this factual allegation to seek an administrative penalty of $1 million on each of the 7,410 trades found to be "offside" the regulations. Professor Hogg submits that just because Staff is treating all trades as a continuing breach would not prevent them in another such case as this from seeking an administrative penalty of over $7 billion. How could anyone conclude that a $1 million administrative penalty, let alone a $7 billion administrative penalty, be anything other than a "punitive fine"? This is the very thing Wilson J. speaks of in *Wigglesworth*. He also notes that in paragraph 24 Wilson J. refers to not only the size or amount of the fine, but also to the possibility of having an unlimited power to impose a fine:

> … that if a body or an official has an unlimited power to fine, and if it does not afford the rights enumerated under s. 11, it cannot impose fines designed to redress the harm done to society at large. Instead, it is restricted to the power to impose fines in order to achieve the particular private purpose.

[27] In addition, Professor Hogg emphasizes that the purpose of the fine and the use of it or how the body is to dispose of the fines it collects is also relevant. Relying on paragraph 24 of *Wigglesworth*, Professor Hogg submits that if the fines do not form part of the Consolidated Revenue Fund, then they are less likely to attract section 11 Charter protection. He submits that in Ontario, although monies received may be specifically designated, in the absence of a specific designation, they do in fact, go to the Consolidated Revenue Fund and therefore section 11 Charter protections are triggered.

[28] The Respondents further submit that the tenor of the submissions and the enormity of the administrative penalty sought by Staff in this case, is no different than if all of this occurred in a criminal court.

ii. The Attorney General's Submissions

[29] The Attorney General intervenes in this proceeding on the constitutional question raised by the Respondents. The Attorney General filed in evidence an affidavit by Poonam Puri sworn on January 16, 2009 (the "Puri Affidavit"). The Puri Affidavit provides expert evidence on the purpose of administrative penalties in the capital markets.

[30] The Attorney General takes no position on the quantum of any administrative penalty that might be imposed on the Respondents, nor does it take any position on whether any administrative penalty should be imposed. However, the Attorney

General does submit that section 127(1)9 of the Act, which allows the Commission to make an order in the public interest requiring a person to pay an administrative penalty of not more than $1 million does not attract section 11 Charter scrutiny.

[31] The criminal and quasi-criminal rights of section 11 of the Charter only apply to persons "charged with an offence." The Respondents are not persons "charged with an offence" within the meaning of section 11 of the Charter and cannot therefore rely on that section. Section 11 of the Charter does not apply to administrative proceedings such as these.

[32] However, should the Commission conclude that an administrative penalty of that magnitude would, in the circumstance of this case, constitute a true penal consequence for the Respondents, the appropriate action would be to impose a lesser administrative penalty that does not constitute a true penal consequence, and not to find that section 127(1)9 of the Act is unconstitutional. This disposition would allow the Commission to exercise its discretion in a constitutionally valid manner without any need to opine on the constitutional validity of the Act itself. Further, the *Report of the Fairness Committee to the Ontario Securities Commission* states:

> … the level of fine to be imposed is a matter of discretion for the Commission in each case. Provided the Commission exercises that discretion in such a way that is in keeping with the notion of an administrative penalty rather than a penal sanction, there may be no problem. The possibility that it might be used for impermissible purposes should not expose the section to section 11 of the Charter.
>
> (C. A. Osborne, Q.C., D. J. Mullan and B. Finlay, Q.C., *Report of the Fairness Committee to the Ontario Securities Commission*, dated March 5, 2004 at 57)

[33] The Attorney General further submits that should we find that the impugned section of the Act infringes the Charter, such infringement is demonstrably justified under section 1 of the Charter. The Attorney General submits that the enforcement of market rules and the maintenance of high standards of fitness and market conduct by market participants are clearly pressing and substantial legislative objectives. The administrative penalty is rationally connected to its purpose, and given the importance of certainty and finality in enforcing market rules, any infringement would be saved pursuant to section 1 of the Charter.

iii. Staff's Submissions

[34] Staff submits that section 11 of the Charter does not apply to proceedings before the Commission pursuant to section 127 of the Act. An administrative penalty does not amount to a "true penal consequence." The administrative penalty is a protective and preventative tool used to fashion appropriate remedies in light of the realities of the Ontario capital markets.

[35] The range of an administrative penalty provided is carefully designed taking into consideration the context of Ontario's capital markets as well as the need to allow for flexible deterrence which would not simply be viewed as a "cost of doing business." The same range of administrative penalty has also been enacted by numerous legislatures and self-regulatory organizations throughout Canada.

iv. Analysis

Commission Proceedings are Regulatory and not Criminal

[36] The *Wigglesworth* decision distinguished between matters which are "…of a public nature, intended to promote public order and welfare within a public sphere of activity …", and "… private, domestic or discipline matters which are regulatory, protective or corrective …" (*Wigglesworth*, *supra* at para. 23). As explained by the Supreme Court of Canada, the latter are "… primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a private sphere of activity …" (*Wigglesworth*, *supra* at para. 23). As a result, section 11 of the Charter does not apply to private, domestic or discipline matters which are regulatory, protective or corrective.

[37] Proceedings under section 127 of the Act are "intended to regulate conduct within a private sphere of activity". In reviewing examples of such regulatory proceedings, the *Wigglesworth* decision itself cites two cases involving securities commissions, including the Commission. Both of these cases affirmed that securities commission proceedings are regulatory in nature and are therefore not subject to section 11 of the Charter (See: *Re Malartic Hygrade Gold Mines (Canada) Ltd. and Ontario Securities Commission* (1986), 54 O.R. (2d) 544, (H.C.J.); and *Barry v. Alberta (Securities Commission)*, (1986), 25 D.L.R. (4th) 730 (Alta. C.A.)).

[38] Subsequent decisions of the Supreme Court of Canada have confirmed the broad regulatory goals of the Act. In *Pezim*, for example, the Court stated:

> It is important to note from the outset that the Act is regulatory in nature. In fact, it is part of a much larger framework which regulates the securities industry throughout Canada. Its primary goal is the protection of the investor but other goals include capital market efficiency and ensuring public confidence in the system …
>
> (*Pezim v. British Columbia (Superintendant of Brokers)*, [1994] 2 S.C.R. 557 ("*Pezim*"), at para. 59)

[39] Both the British Columbia Supreme Court and the British Columbia Court of Appeal have examined whether the addition of an administrative penalty power converts a regulatory proceeding into a criminal one. In both cases the Courts found that, even with this potential sanction in place, the British Columbia Securities Act "remains a regulatory statute" (*Johnson v. British Columbia (Securities Commission)* (2001), 206 D.L.R. (4th) 711 (B.C. C.A.) at para. 42; and *British Columbia (Securities Commission) v. Simonyi-Gindele*, [1992] B.C.J. No. 2893 (S.C.) at 3 (Q.L.))c.

[40] Based on the analysis above, a hearing under section 127 of the Act, including a hearing in which an administrative penalty is sought, is fundamentally regulatory. It does not meet the "criminal by nature" characterization of an offence.

The Administrative Penalty is not a Penal Consequence

[41] Having determined that section 127(1)9 of the Act does not meet the "criminal by nature" characterization of an offence, we must now determine whether an administrative penalty prescribed by section 127(1)9 of the Act may impose "true penal consequences" on the Respondents. In *Wigglesworth*, a true penal consequence was characterized as follows:

> … a true penal consequence which would attract the application of s. 11 is imprisonment or a fine which by its magnitude would appear to be imposed for the purpose of redressing the wrong done to society at large rather than to the maintenance of internal discipline within the limited sphere of activity.
>
> (*Wigglesworth*, *supra* at para. 24)

[42] The question is thus whether an administrative penalty of up to $1,000,000 per breach is a sanction of sufficient magnitude to be deemed "penal". That question does not always permit a simple or easy answer. As stated by Wilson J. in *Wigglesworth*:

> … if a particular matter is of a public nature, intended to promote public order and welfare within a public sphere of activity, then that matter is the kind of matter which falls within s. 11. It falls within the section because of the kind of matter it is. <u>This is to be distinguished from private, domestic or disciplinary matters which are regulatory, protective or corrective and which are primarily intended to maintain discipline, professional integrity and professional standards or to regulate conduct within a limited sphere of activity</u> …
>
> (*Wigglesworth*, *supra*, at para. 23 [emphasis added])

[43] The underlined portion of the quote above fits squarely with section 127 of the Act including section 127(1)9. We therefore conclude that the administrative penalty in question, notwithstanding its quantum, has for its primary purpose, the protection of investors as well as specific deterrence to the Respondents to prevent them from engaging in similar conduct in the future.

[44] These goals were clearly articulated by the committee of the Ontario Legislature which recommended adding the present administrative penalty provision to the Act (the "Five Year Review Committee"):

> In our view, the maximum amount for an administrative fine must be sufficient to allow the Commission to send an appropriate deterrent message, having regard to both the gravity of the conduct under consideration and the respondents that are the subject of the proceedings.
>
> (*Five Year Review Committee Draft Report – Reviewing the Securities Act (Ontario)* (2002), 25 O.S.C.B. (Supp) at 122)

[45] The protective and deterrent functions served by the administrative penalty in our capital markets have been acknowledged and emphasized by this Commission:

> The purpose of an administrative penalty is to deter the particular respondents from engaging in the same or similar conduct in the future and to send a clear deterrent message to other market participants that the conduct in question will not be tolerated in Ontario capital markets.
>
> (*Re Limelight Entertainment Inc.* (2008), 31 O.S.C.B. 12030 at para. 67)

[46] The Supreme Court of Canada has confirmed general deterrence is an appropriate regulatory objective for securities regulators. In *Re Cartaway Resources Corp.*, [2004] 1 S.C.R. 672 ("*Cartaway*") the Court considered the British Columbia Securities Commission's administrative penalty power. In confirming that administrative penalties may be used to send a message of general deterrence, Le Bel J. wrote:

> … it is reasonable to view general deterrence as an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventative. …
>
> The *Oxford English Dictionary* (2nd ed. 1989), vol XII, defines "preventive" as "[t]hat anticipates in order to ward against; precautionary; that keeps from coming or taking place; that acts as a hindrance or obstacle". A penalty that is meant to deter generally is a penalty that is designed to keep an occurrence from happening; it discourages similar wrongdoing in others. In a word, a general deterrent is preventative.
>
> (*Cartaway*, *supra* at paras. 60 and 61)

[47] Is an administrative penalty of up to $1,000,000 per failure to comply with Ontario securities law proportionate to the legislative goals of general deterrence and investor protection, particularly in the context in which the administrative penalty is sought to be applied?

[48] In order to determine whether section 127(1)9 imposes "true penal consequences" on the Respondents, we must take a contextual approach. The importance of a contextual analysis was referred to as early as 1991 when the Supreme Court in *R. v. Wholesale Travel Group Inc.*, [1991] 2 S.C.R. 154 stated:

> A contextual approach is particularly appropriate in the present case to take account of the regulatory nature of the offence and its place within a larger scheme of public welfare legislation. This approach requires that the rights asserted by the appellant be considered in light of the regulatory context in which the claim is situated, acknowledging that a *Charter* right may have different scope and implications in a regulatory context than in a truly criminal one.
>
> (*R. v. Wholesale Travel Group Inc.*, *supra* at para. 150)

[49] With respect to the regulatory context, this Commission regulates Ontario's capital markets which represents a significant proportion of Canada's capital markets and economic activity. For example:

(a) In 2004, of the 1,222 issuers listed on the Toronto Stock Exchange, 577 issuers were headquartered in Ontario representing 47% of the market capitalization of the TSX;

(b) Ontario is headquarters to a significant number of relatively larger issuers with relatively high market capitalizations, e.g. in 2004, of the 243 Financial Services issuers listed on the TSX, 193 issuers (almost 80%) were headquartered in Ontario. These Ontario based financial services issuers, regulated by the Commission, had a combined market capitalization of nearly $222 billion, representing 76% of the market capitalization of all financial services issuers listed on the TSX.

(c) In 2007, four of the top five most profitable public companies in Canada were headquartered in Ontario, including Royal Bank of Canada ($4.7 billion), Toronto-Dominion Bank ($4.6 billion), Manulife Financial ($3.9 billion), and Bank of Nova Scotia ($3.6 billion).

(See: Puri Affidavit at paras. 14, 16 and 17)

[50] The scale of Ontario's capital markets frequently finds its reflection in the scale of the matters that come before the Commission. For example, in a recent proceeding, certain directors and officers of a public company engaged in improper back-dating and repricing of stock options issued under the company's stock option plans. The potential shortfall to the company's treasury resulting from these practices was calculated at approximately $66 million as set out in the settlement agreement (See: *Re Research in Motion Ltd.* (2009), 32 O.S.C.B. 1421).

[51] The realities of Ontario's capital markets were critical to the Five Year Review Committee's recommendation that the Commission be empowered to impose an administrative penalty of up to $1,000,000 per contravention. The Committee sought to ensure that the administrative penalty would not simply be viewed as a "cost of doing business" or a "licensing fee" for market participants:

> Giving the Commission the power to impose an administrative fine will enable it to tailor sanctions to suit the particular circumstances of a case. The administrative fine that the Commission is able

> to impose should not be viewed merely as a "cost of doing business" or a licensing fee. … In our view, a maximum of $1,000,000 per contravention is sufficient to allow the Commission to send an appropriate deterrent message, having regard to, among other things, the gravity and impact of the conduct under consideration and the nature of the respondents that are the subject of the proceedings.
>
> (*Five Year Review Committee Final Report – Reviewing the Securities Act* (Ontario) (2003), 26 O.S.C.B. (Supp-2) at 214; for further discussion on this point see also: *Alberta (Securities Commission) v. Brost*, [2008] A.J. No. 1071 (Alta. C.A.) ("*Brost C.A.*") at para. 54; and *Lavallee v. Alberta (Securities Commission)*, [2009] A.J. No. 21 (Alta. Q.B.) at para. 164)

[52] Legislatures throughout Canada have come to a similar view on the appropriateness of the available range of an administrative penalty. The Securities Commissions of Nova Scotia, Quebec, Alberta and British Columbia have all been granted the power to award administrative penalties. For instance, the Alberta Securities Commission and the Nova Scotia Securities Commission have the power to order a person or company to pay an administrative penalty of not more than one million dollars for each contravention or failure to comply (*Securities Act*, R.S.N.S. 1989, c. 418, s. 135; and *Securities Act*, R.S.A. 2000, c. S-4, s. 199); the British Columbia Securities Commission can order a person to pay an administrative penalty of not more than $1 million for each contravention (*Securities Act*, R.S.B.C. 1996, c. 418, s. 162); and in Quebec, the Bureau de décision et de révision en valeurs mobilières can order the payment of an administrative penalty not exceeding $1 million dollars (*Securities Act*, R.S.Q., c.V-1.1, s. 273.1).

[53] An even greater range for an administrative penalty is available to self-regulatory organizations recognized by this Commission (notwithstanding that the penalties are based on contractual agreements). The Investment Industry Regulatory Organization of Canada (formerly the Investment Dealers Association, hereinafter "IIROC"), the national self-regulatory organization for securities dealers, has the authority under the *Universal Market Integrity Rules* to impose a fine not to exceed the greater of $1,000,000 and an amount triple to the financial benefit which accrued to the person as a result of committing the contravention (*Universal Market Integrity Rules*, Rule 10.5(1)(b)). In addition, IIROC also has the authority to order its Approved Members and Dealer Members to pay a fine not exceeding the greater of $1,000,000 (in the case of Approved Persons) and $5,000,000 (in the case of Dealer Members) per contravention and an amount equal to three times the profit made or loss avoided by reason of the contravention (See: *IIROC Rule Book, Dealer Member Rules*, Rules 20.33 and 20.34).

[54] The Mutual Fund Dealers Association of Canada ("MFDA"), which fulfills the same role for the distributors of mutual funds, also has the authority to impose a fine not exceeding the greater of $5,000,000.00 per offence, and an amount equal to three times the profit obtained or loss avoided by such a person as a result of committing the violation (See: *MFDA By-Law No. 1*, ss. 24.1.1 and 24.1.2).

[55] The Respondents in this matter operate in a specific and tightly regulated segment of the Ontario capital markets, which is that of investment dealers and the approved persons employed by those dealers. Investment dealers and their employees are subject to significant capital adequacy and conduct of business requirements. Investment dealers must meet stringent capital requirements and demonstrate the ability and willingness to conduct business in a manner consistent with the securities laws of the province in which registration is held, and they must adhere to rules and regulations of IIROC. Approved persons/employees share analogous responsibilities.

[56] In pursuit of the legitimate regulatory goal of deterring others from engaging in illegal conduct, the Commission must, therefore, have proportionate sanctions at its disposal. The administrative penalty represents an appropriate legislative recognition of the need to impose sanctions that are more than "the cost of doing business". In the current securities regulation and today's capital markets context, a $1,000,000 administrative penalty is not *prima facie* penal.

The Indicia of a True Penal Consequence Are Not Present

[57] In *Wigglesworth*, Wilson J. indicated that "[o]ne indicium of the purpose of a particular fine is how the body is to dispose of the fine that it collects" (at para. 24). Regulatory fines, under this test, are less likely to be disbursed into the Consolidated Revenue Fund.

[58] In the case of the Commission's administrative penalty, subsection 3.4(2) of the Act provides that the sums collected as administrative penalties may be designated to or for the benefit of third parties. Only if there is no specific designation would the funds collected go to the Consolidated Revenue Fund.

[59] Administrative penalties that have been imposed by the Commission to date have contained a clause providing that the administrative penalty funds be distributed to or for the benefit of third parties (See for example: *Re Crombie* (2009), 32 O.S.C.B. 1628; *Re Research in Motion Ltd.*, *supra*; *Re Biovail Corp.* (2009), 32 O.S.C.B. 563; *Re McCaffrey* (2009), 32 O.S.C.B. 827; *Re Devendranauth Misir* (2009), 32 O.S.C.B. 1807; *Re Limelight Entertainment Inc.*, *supra*; *Re First Global Ventures, S.A.* (2008), 31 O.S.C.B. 10869; *Re Duic* (2008), 31 O.S.C.B. 8551; *Re Leung* (2008), 31 O.S.C.B. 6759; *Re Lee* (2008), 31

O.S.C.B. 8730; *Re Stern* (2008), 31 O.S.C.B. 4029; *Re Momentas Corp.* (2007), 30 O.S.C.B. 6674; *Re Melnyk* (2007), 30 O.S.C.B. 4695 (Order); *Re Griffiths* (2006), 29 O.S.C.B. 9529; *Re Bennett Environmental Inc.* (2006), 29 O.S.C.B. 9527; *Re Mountain Inn at Ribbon Creek Limited Partnership* (2005), 28 O.S.C.B. 9489; and *Re Wells Fargo Financial Canada Corp.* (2005), 28 O.S.C.B. 1062 (Order)).

Criminal Characteristics

[60] The conduct at issue in this matter, if prosecuted under section 122 of the Act in the Ontario Court of Justice would be subject to a penalty of imprisonment for up to five years less a day and a fine of up to $5,000,000, or to both. When looked at in that light, the administrative penalties being sought by Staff, are clearly not penalties that move them to the range of "criminal punishment".

No Imprisonment or Criminal Record Follows

[61] As earlier mentioned, the Commission cannot impose administrative penalties designed to redress the harm done to society at large. However, if the administrative penalty is restricted to achieve the particular private purposes which the Commission is empowered to govern and regulate, which is the result in this case, then section 11 of the Charter does not apply. The requested appropriate administrative penalty is not a penal consequence for these Respondents. It has none of the impermissible characteristics that have been identified by the Supreme Court of Canada in its review of financial penalties. The range of the requested administrative penalties is consistent with the Commission's responsibility for regulating Ontario's capital markets and its related mandate: to provide protection to investors from unfair, improper or fraudulent practices; and to foster fair and efficient capital markets and confidence in capital markets. We believe that the administrative penalties being sought are consistent with a measured and proportionate administrative tool response.

The Magnitude of the Misconduct

[62] The Respondents' improper conduct in this case involved significant sums of money. The quantity and value of Biovail common shares bought or sold by Rowan for the Trust Accounts during 2002, 2003 and 2004 were extremely high; as set out in paragraphs 26, 27 and 28 of the Merits Decision:

Year	Shares Bought		Shares Sold	
	- Figures are Approximate -			
	Quantity	US$	Quantity	US$
2002	7.1 million	265 million	7.0 million	250 million
2003	9.5 million	316 million	10.3 million	340 million
2004	0.2 million	2 million	0.7 million	14 million
Total	16.8 million	583 million	18.0 million	604 million

In addition, during 2002 and 2003, Rowan bought for the Trust Accounts 24,500 Biovail call options at a cost of approximately US$ 10 million.

[63] Rowan engaged in a high volume of discretionary trading of Biovail securities in the Trust Accounts during each of the Biovail Blackout Periods (See: Merits Decision, *supra* at paras. 156 and 157). As summarized below:

Year	Shares Bought		Shares Sold	
	- Figures are Approximate -			
	Quantity	US$	Quantity	US$
2002	2.5 million	110 million	2.0 million	100 million
2003	2.5 million	90 million	2.8 million	100 million
Total	5.0 million	200 million	4.8 million	200 million

In addition, during 2003, over 11,000 Biovail call options were acquired at a cost of approximately US$ 4 million.

[64] Rowan failed to file insider reports with respect to 7,410 trades involving 37,305,278 shares of Biovail during the period between January 1, 2002 and December 31, 2004.

[65] Rowan's conduct also resulted in the failure to disclose in Biovail's Management Information Circulars large numbers of Biovail shares over which he exercised or shared control or direction, amounting to nearly 4 million Biovail shares in 2002, over 3 million shares in 2003 and over 4 million shares in 2004. Management Information Circulars consequently disclosed incomplete and misleading information regarding insiders' shareholdings over the three-year period 2002–2004 (See: Merits Decision, *supra* at paras. 33, 125 and 129).

[66] Watt Carmichael earned approximately $2,350,000 in commissions from trading in the Trust Accounts during the period 2002 to 2004 (See: Merits Decision, *supra* at paras. 29, 30 and 31).

The Role of an Administrative Penalty in Today's Capital Markets

[67] Given the Respondents' status as registrants in a highly-regulated and broadly capitalized industry, given the scope of their misconduct, and the profits they realized from the trading in question, an administrative penalty would be an essential and appropriate aspect of a protective package of responsive sanctions. It is rationally connected to the objective, "the maintenance of high standards of fitness and business conduct to ensure honest and responsible conduct by market participants," and is a proportionate response in pursuit of that objective (*R. v. Oakes*, [1986] 1 S.C.R. 103).

[68] Capital markets are important to Canada's economic health and competitiveness, and Ontario represents an important part of the Canadian capital markets, with headquarters for close to 50% of public company issuers listed on the TSX. Failure to follow the rules causes significant harm to investors and the entire capital markets, including other market participants (See: Puri Affidavit at paras. 11, 14 and 29).

[69] Non-compliance with regulations negatively impacts investor confidence in the capital markets which may make investors less likely to trade (resulting in lower liquidity) and/or demand a higher return for their savings (resulting in a higher cost of capital). Non-compliance can also impair the price discovery process and result in inefficiencies in capital markets pricing. Non-compliance puts Ontario at a disadvantage in light of the global competition among jurisdictions for capital. (See: Puri Affidavit at para. 38)

[70] Both regulatory theory and the experience of financial regulators support the use of administrative monetary penalties as a compliance tool. Furthermore, regulatory theory and the experience of financial regulators indicate that an administrative penalty should be of a magnitude sufficient to ensure effective deterrence. Administrative monetary penalties attach a price or a quantifiable cost to non-compliance. They occupy a natural place in the middle of the range of enforcement tools that is short of incapacitate sanctions (such as license suspensions or cease trade orders) or prosecutions, but more serious than moral suasion and warning letters (See: Puri Affidavit at paras. 50-58).

[71] In the context of the capital markets, where licensed market participants engage in regulated economic activity involving enormous sums of money, and where market participants can realize gains of millions of dollars even on a single transaction by acting contrary to market rules, significant financial penalties are necessary in order to maintain compliance with regulations (for a discussion regarding the role of fines see: *Wigglesworth*, *supra* at para. 23; and *Martineau v. M.N.R.*, [2004] 3 S.C.R. 737 at para. 60).

[72] LeBel J. of the Supreme Court of Canada in *Cartaway* stated:

> In my view, nothing inherent in the Commission's public interest jurisdiction, as it was considered by this Court in *Asbestos*, *supra*, prevents the Commission from considering general deterrence in making an order. To the contrary, it is reasonable to view general deterrence as an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventative. Ryan J.A. recognized this in her dissent: "The notion of general deterrence is neither punitive nor remedial. A penalty that is meant to generally deter is a penalty designed to discourage or hinder like behaviour in others" (para. 125).
>
> The *Oxford English Dictionary* (2nd ed. 1989), vol. XII, defines "preventive" as "[t]hat anticipates in order to ward against; precautionary; that keeps from coming or taking place; that acts as a hindrance or obstacle". A penalty that is meant to deter generally is a penalty that is designed to keep an occurrence from happening; it discourages similar wrongdoing in others. In a word, a general deterrent is preventative. It is therefore reasonable to consider general deterrence as a factor, albeit not the only one, in imposing a sanction under s. 162. The respective importance of general deterrence as a factor will vary according to the breach of the Act and the circumstances of the person charged with breaching the Act.

> It may well be that the regulation of market behaviour only works effectively when securities commissions impose *ex post* sanctions that deter forward-looking market participants from engaging in similar wrongdoing. That is a matter that falls squarely within the expertise of securities commissions, which have a special responsibility in protecting the public from being defrauded and preserving confidence in our capital markets.
>
> (*Cartaway*, *supra* at paras. 60-62)

[73] Although a $1 million administrative penalty "is not likely to be a trivial amount" when imposed on individuals or small businesses, an insubstantial sanction would fail to meet the important legislative objective of encouraging compliance with securities laws aimed at protecting investors from unfair, improper or fraudulent practices and at fostering fair and efficient capital markets and confidence in those markets. Financial sanctions must be significant and not trivial in order to have their intended deterrent effect in the securities context. It is to be remembered that such administrative penalty may be applied not just to individuals and small businesses but also to very large and profitable firms, for whom a lower administrative penalty may indeed be trivial.

[74] An administrative monetary penalty may not act as a sufficient deterrent if its magnitude is inadequate compared with the benefit obtained by non-compliance. In some instances, even a $1 million administrative penalty may not act as a sufficient deterrent if the benefit of non-compliance exceeded $1 million or if the probability of detection was very low. As such, there is a need for regulatory sanctions to create economic incentives to foster compliance or alternatively, remove economic incentives for non-compliance. (See: Puri Affidavit at paras. 51-56).

[75] In that regard, a report for the UK Ministry of Justice on the system of regulatory sanctions referred to in the Puri Affidavit (the "Macrory Report"), stated:

> …
>
> **A sanction should aim to eliminate any financial gain or benefit from non-compliance.** Firms may calculate that by not complying with a regulation, they can make or save money. They may also take a chance and hope that they are not caught for failing to comply with their regulatory obligations or for deliberately breaking the law. Some firms may even believe that if they are caught, the financial penalties handed down by the courts will usually be relatively low and they will probably still retain some level of financial gain.
>
> If, however, firms know that making money by breaking the law will not be tolerated and sanctions can be imposed that specifically target the financial benefits gained through non-compliance, then this can reduce the financial incentive for firms to engage in this type of behaviour. For firms that persist in operating this way, removing financial benefits will ensure that, in the future, the financial gains are not enough of an incentive to break the law. …
>
> (Professor Richard B. Macrory, *Regulatory Justice: Making Sanctions Effective, Final Report*, dated November 2006 at 2.11 [emphasis in original])

[76] In contrast to criminal law, which typically prohibits conduct outright, regulatory legislation like the Act typically makes participation in regulated economic activity (which is implicitly or explicitly encouraged) conditional on acceptance of prescribed standards or rules of conduct. Anyone who chooses to engage in regulated activity is fairly presumed to accept the conditions of participation, including administrative oversight by regulators, and sanctions to induce compliance. The Respondents have voluntarily engaged in a regulated sector of the economy with the expectation of financial gain, and should properly be subject to the "high standards of fitness and business conduct to ensure honest and responsible conduct by market participants" demanded by section 2.1(2) of the Act. Administrative monetary penalties for breaches of securities law under section 127(1)9 are an important means of maintaining these high standards of compliance with the rules of market conduct.

v. Conclusion

[77] We do not accept the Respondents' challenge to the Constitutional validity of the administrative penalty provision of the Act. We conclude that section 127(1)9 does not infringe the Charter nor its principles or values.

B. If the Provision Does not Infringe the Charter, is Staff Seeking to Impose an Administrative Penalty Retrospectively in this Case?

i. Respondents' Submissions

[78] The Respondents submit that even if we were to find the $1,000,000 administrative penalty not to be "punitive", it is nevertheless designed to penalize the Respondents and as such, cannot apply retroactively. They submit the Commission's findings relate to actions that occurred prior to the coming into effect of the Commission's power to impose administrative monetary penalties on April 7, 2003. The presumption against retrospectivity should apply, precluding the Commission from ordering the payment of an administrative penalty in this matter. They point out the basic principle that retrospective laws are, absent specific and exceptional circumstances, unfair. They point out that the Merits Decision found $900,000 in commission was generated as a result of trades in 2002; $1.4 million in 2003 and approximately $50,000 in 2004, whilst the administrative penalty did not come into force until April 7, 2003.

[79] The Respondents rely on *Thow v. British Columbia (Securities Commission)*, [2009] B.C.J. No. 211 (B.C.C.A.) ("*Thow*"). At the time of Thow's misconduct the maximum administrative penalty that could be imposed by the British Columbia Securities Commission was $250,000. An administrative penalty of $6 million was imposed by the Commission. The Court of Appeal struck down the retroactive component of the Commission's decision.

ii. Staff's Submissions

[80] Staff submits that the issue of retrospectivity does not arise in this case. The majority of the Respondents' conduct occurred in the period after the power to impose an administrative penalty was granted to the Commission. Even if the issue did arise, an administrative penalty is designed to protect the public and not to punish.

[81] In particular, Staff submits that the Respondents' conduct spanned over 2002, 2003 and 2004. Staff points out that Rowan failed to file insider reports relating to thousands of trades carried out in the Trust Accounts in the period between January, 2002 and June 22, 2004.

[82] Staff submits that *Thow* is a case of total retrospective application of the statute. In that case all of the misconduct occurred between January 2003 and May 2005 and the British Columbia Securities Commission increased its administrative penalty from $250,000 to $1 million on May 18, 2006.

[83] Staff points out that in *Alberta (Securities Commission) v. Brost* (2007), ABASC 482 ("*Brost ASC*") the Alberta Securities Commission's ("ASC") power to impose an administrative penalty was increased from $100,000 to a $1 million maximum. The ASC concluded that it can impose the increased administrative penalty retrospectively because it is not punitive in its intent. Staff refers to paragraph 33 of this decision of ASC, which they say applies to the facts of this case:

> It is not, in any event, clear to us that we need consider retrospectivity. The Strategic distributions continued after 8 June 2005 when the new, higher maximum administrative penalty took effect. Alternatives and the Strategic Respondents continued in their roles after that date. In respect of Brost, it is true that the Brost Interview, which took place in August 2004, was the compelling piece of evidence that proved Brost's misconduct and, indeed, the centrality of his role in what transpired. However, the date of the Brost Interview itself was not indicative of the timing of his misconduct; nor, as noted, did the scheme that he instigated end with the Brost Interview or before the administrative penalty maximum was increased. That continued misconduct followed the scheme devised earlier by Brost. Had Staff not intervened with the freeze order when they did, we believe that the misconduct likely would have continued even longer. It follows that applying the Act as it read after 8 June 2005 to the facts of this case is not a retrospective application.
>
> (*Brost ASC*, *supra* at para. 33)

[84] Accordingly, Staff argues the ASC decision is applicable to this case. They say this is not like *Thow*, where a respondent ceased its activities prior to the coming into force of a provision increasing the maximum amount for an administrative penalty that can be ordered by a securities regulator. In this case, like *Brost ASC*, the Respondents continued to engage in conduct well after the time of the coming into force of a provision increasing the maximum amount for an administrative penalty. On that basis, Staff argues that this is not a retrospective application of section 127(1)9 of the Act.

iii. Analysis

[85] The issue of retrospectivity of legislation is a matter about which much has been written over the years. In 1989, Justice L'Heureux-Dubé in *Brosseau v. Alberta (Securities Commission)*, [1989] 1 S.C.R. 301 at paragraph 44 wrote:

> The basic rule of statutory interpretation, that laws should not be construed so as to have retrospective effect, was reiterated in the recent decision of this Court in *Angus v. Sun Alliance Insurance Co.*, [1988] 2 S.C.R. 256. That case, however, dealt with the question of the retrospective effect of procedural versus substantive provisions. The present case presents a different facet of the problem of retrospectivity.

[86] She continues at paragraph 47 with an excerpt of Dickson J. in *Gustavson Drilling (1964) Ltd. v. Minister of National Revenue*, [1977] 1 S.C.R. 271, at page 279:

> The general rule is that statutes are not to be construed as having retrospective operation unless such a construction is expressly or by necessary implication required by the language of the Act.

[87] At paragraph 55, Justice L'Heureux-Dubé concludes her decision as follows:

> The provisions in question are designed to disqualify from trading in securities those persons whom the Commission finds to have committed acts which call into question their business integrity. This is a measure designed to protect the public, and it is in keeping with the general regulatory role of the Commission. Since the amendment at issue here is designed to protect the public, the presumption against the retrospective effect of statutes is effectively rebutted.

[88] In 2005, the Supreme Court of Canada in *B.C. v. Imperial Tobacco Canada Ltd.* [2005], 2 S.C.R. 473 Major J., speaking for the Court, wrote as follows at paragraph 69:

> (1) Prospectivity in the Law
>
> Except for criminal law, the retrospectivity and retroactivity of which is limited by s. 11(g) of the Charter, there is no requirement of legislative prospectivity embodied in the rule of law or in any provision of our Constitution. Professor P.W. Hogg sets out the state of the law accurately (in Constitutional Law of Canada (loose-leaf ed.), vol. 2, at p. 48-29):
>
> > Apart from s. 11(g), Canadian constitutional law contains no prohibition of retroactive (or ex post facto) laws. There is a presumption of statutory interpretation that a statute should not be given retroactive effect, but, if the retroactive effect is clearly expressed, then there is no room for interpretation and the statute is effective according to its terms. Retroactive statutes are in fact common.

[89] At paragraph 71 he continues:

> The absence of a general requirement of legislative prospectivity exists despite the fact that retrospective and retroactive legislation can overturn settled expectations and is sometimes perceived as unjust: see E. Edinger, "Retrospectivity in Law" (1995), 29 *U.B.C. L. Rev.* 5, at p. 13. Those who perceive it as such can perhaps take comfort in the rules of statutory interpretation that require the legislature to indicate clearly any desired retroactive or retrospective effects. Such rules ensure that the legislature has turned its mind to such effects and "determined that the benefits of retroactivity [or retrospectivity] outweigh the potential for disruption or unfairness" …

[90] In October 2008, the Alberta Court of Appeal released its decision in *Brost C.A.*, *supra*. Although retrospective application of an increase of a potential administrative penalty was not the principal issue argued in that case, there was some reference (it appeared to be almost ancillary) made to retrospectivity by the Court. The totality of the decision relating to retrospectivity is to be found beginning at paragraph 56 and concluding at paragraph 57. These paragraphs read as follows:

> The Commission held that the administrative penalty amendment that took effect on June 8, 2005 could be applied in this case. Prior to June 8, 2005, the maximum administrative penalty that could be imposed under the Act was $100,000; after June 8, 2005, it was $1 million. The Commission held that, because administrative penalties are not punitive, the presumption against retrospective application did not bar it from imposing administrative penalties greater than the maximum administrative penalty that was available prior to June 8, 2005…
>
> The Commission was correct to conclude that the presumption against retrospective application did not apply in this case because administrative penalties under the Act are not punitive but are instead designed to protect the public: *Brosseau v. Alberta Securities Commission* … Moreover, contrary to what Brost and Alternatives suggest, it is well settled that "[e]xcept for criminal law, the retrospectivity and retroactivity of which is limited by s. 11(g) of the Charter, there is no requirement

> of legislative prospectivity embodied in … any provision of our Constitution:" *British Columbia v. Imperial Tobacco Canada Ltd.* …
>
> (*Brost C.A.*, *supra* at paras. 56 and 57)

[91] Chronologically, the last case to which we wish to make reference to is *Thow*, *supra*, which was released on February 12, 2009. The British Columbia Securities Commission imposed an administrative penalty of $6 million on Mr. Thow. His contraventions occurred at a time when the maximum administrative penalty was $250,000. Almost a year after the contraventions, in May 2006, legislation was enacted authorizing an increase in the maximum administrative penalty from $250,000 to $1 million for each contravention. In 2007, the British Columbia Securities Commission imposed the $6 million administrative penalty. The British Columbia Court of Appeal at paragraph 10 noted the quote from Elizabeth Edinger in "Retrospectivity in Law" (1995), 19 U.B.C.L.R. 5 at 12:

> The common theme of judges and scholars throughout the centuries has been that retrospective laws are unfair or unjust.

[92] In *Thow*, the Court wrote at paragraphs 37, 38, 47 and 49, respectively:

> Despite the similarity in the language used in the three decisions [*Brosseau*, *Asbestos* and *Cartaway*], it must be recognized that the issues in the cases were somewhat different. *Brosseau*, like the present case, concerned the retroactive application of statutory amendments. In contrast, *Asbestos* and *Cartaway* were concerned with the scope of considerations that a securities commission can take into account in imposing a sanction.
>
> …
>
> *Asbestos* and *Cartaway* establish that securities commissions, not being criminal courts, may not impose penalties that are "punitive" in the sense of being designed to punish an offender for past transgressions. They may, however, impose penalties that place burdens (even very heavy burdens) on offenders, as long as the penalties are designed to encourage compliance with regulations in the future. In essence, penalties may be directed at general or specific deterrence and at protection of the public; penalties that are purely retributive or denunciatory, however, are not appropriately imposed by administrative tribunals.
>
> …
>
> The concept of "punishment" is an elastic one, and its meaning must be taken in context. In *Cartaway* and *Asbestos*, the Supreme Court of Canada used the concept to describe those penalties imposed on an offender to mark moral disapprobation of his or her conduct. In *Brosseau*, in contrast, I believe that the Court used the word "punish" in a broader context, to describe all sanctions imposed for the *purpose* of penalizing an offender. On the other hand, penalties imposed solely for the *purpose* of protecting society from the offender in the future, were not considered "punishment", even if they had the *effect* of placing burdens on the offender. [emphasis in the original]
>
> …
>
> Here, the Commission's imposition of the fine was arguably not "punitive" in the narrow sense of the word; that is, it may not have been imposed as a punishment for Mr. Thow's moral failings, and it may not have been motivated by a desire for retribution, or to denounce his conduct. Nonetheless, it was "punitive" in the broad sense of the word; it was designed to penalize Mr. Thow and to deter others from similar conduct. It was not merely a prophylactic measure designed to limit or eliminate the risk that Mr. Thow might pose in the future.

[93] The Court found that the new increased administrative penalty did not apply and the administrative penalty was reduced to the maximum permitted at the time the infractions occurred.

[94] We agree with and prefer to follow the reasoning and rationale of the British Columbia Court of Appeal in *Thow*, although we would emphasize that the imposition of a fine is a penalty and would downplay the use of the word punitive even though it is used in a limited sense in that decision. The law as developed by the Supreme Court of Canada cases, and followed in *Thow*, is that ongoing constraints or prohibitions may be applied retrospectively but penalty provisions, particularly monetary penalties, should not to be applied retrospectively.

[95] As a result, we therefore conclude that any administrative penalty to be imposed on the Respondents in this matter must relate only to the conduct that occurred after April 7, 2003.

[96] From the information before us it appears that Rowan failed to report more than 7,410 transactions involving 37,305,278 shares of Biovail, of which 3,690 transactions involving 19.402,118 shares of Biovail (52%) occurred after April 7, 2003. Although the imposition of an administrative penalty is not a mathematical exercise, we nevertheless conclude that any administrative penalty imposed should be approximately 52% of the administrative penalty we would have imposed had all of the transgressions (shares traded) occurred subsequent to April 7, 2003. In the result, therefore, any administrative penalty imposed upon the parties will be 52% of what we would otherwise deem to be an appropriate penalty.

iv. Conclusion

[97] In the circumstances of this case, we find that it is appropriate to make a prospective order that is both protective and preventative in nature to better protect the capital markets. We believe that the sanctions imposed which are set out below, are sufficient both to respond to the specific misconduct and to send a message to other market participants about the importance of fulfilling their statutory duties.

C. What are the Appropriate Sanctions in this Case?

i. The Law

[98] The Commission's mandate as set out at section 1.1 of the Act is: (i) to provide protection to investors from unfair, improper or fraudulent practices; and (ii) to foster fair and efficient capital markets and confidence in capital markets.

[99] The primary means for achieving the purposes of the Act as set out at paragraph 2 of section 2.1 are:

i) requirements for timely, accurate and efficient disclosure of information,

ii) restrictions on fraudulent and unfair market practices and procedures, and

iii) requirements for the maintenance of high standards of fitness and business conduct to ensure honest and responsible conduct by market participants.

[100] In exercising its public interest jurisdiction, the Commission must act in a protective and preventative manner. The role of the Commission is to impose sanctions that will protect investors and the capital markets from exposure to similar conduct in the future. As stated by the Commission in *Re Mithras Management Ltd.*:

> … [u]nder sections 26, 123 and 124 of the Act, the role of this Commission is to protect the public interest by removing from the capital markets – wholly or partially, permanently or temporarily, as the circumstances may warrant – those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of those capital markets. We are not here to punish past conduct; that is the role of the courts, particularly under section 118 [now 122] of the Act. We are here to restrain, as best we can, future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient. In so doing we must, of necessity, look to past conduct as a guide to what we believe a person's future conduct might reasonably be expected to be; we are not prescient, after all.
>
> (*Re Mithras Management Ltd.* (1990), 13 O.S.C.B. 1600 at 1610-1611).

[101] The Supreme Court of Canada in *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132 ("*Asbestos*") commented on the Commission's public interest jurisdiction. The Court described it, in part, as follows:

> … "[t]he purpose of the Commission's public interest jurisdiction is neither remedial nor punitive; it is protective and preventive, intended to be exercised to prevent likely future harm to Ontario's capital markets". …
>
> … The role of the OSC under s. 127 is to protect the public interest by removing from the capital markets those whose past conduct is so abusive as to warrant apprehension of future conduct detrimental to the integrity of the capital markets …
>
> In summary, pursuant to s. 127(1), the OSC has the jurisdiction and a broad discretion to intervene in Ontario capital markets if it is in the public interest to do so. However, the discretion to act in the

> public interest is not unlimited. In exercising its discretion, the OSC should consider the protection of investors and the efficiency of, and public confidence in, capital markets generally. In addition, s. 127(1) is a regulatory provision. The sanctions under the section are preventive in nature and prospective in orientation. …
>
> (*Asbestos*, *supra* at paras. 42-43 and 45)

[102] In addition, the Commission should consider general deterrence as an important factor when determining appropriate sanctions. In *Cartaway*, the Supreme Court of Canada stated that "… it is reasonable to view general deterrence as an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventative" (at para. 60).

[103] In determining the appropriate sanctions in this matter, we must ensure that the sanctions imposed are proportionate to the conduct of the Respondents (*Re M.C.J.C. Holdings Inc. and Michael Cowpland*, (2002), 25 O.S.C.B. 1133 ("*Re M.C.J.C. Holdings*") at 1136).

[104] The Commission has previously identified the following as some of the factors that it should be considering when imposing sanctions:

(a) the seriousness of the conduct and the breaches of the Act;

(b) the respondent's experience in the marketplace;

(c) the level of a respondent's activity in the marketplace;

(d) whether or not there has been recognition by a respondent of the seriousness of the improprieties;

(e) whether or not the sanctions imposed may serve to deter not only those involved in the matter being considered, but any like-minded people, from engaging in similar abuses of the capital markets;

(f) the size of any profit obtained or loss avoided from the illegal conduct;

(g) the size of any financial sanction or voluntary payment;

(h) the effect any sanctions may have on the ability of a respondent to participate without check in the capital markets;

(i) the reputation and prestige of the respondent;

(j) the effect any sanction might have on the livelihood of the respondent;

(k) the shame, or financial pain, that any sanction would reasonably cause to the respondent;

(l) the remorse of the respondent; and

(m) any mitigating factors.

(See: *Re Belteco Holdings Inc.* (1998), 21 O.S.C.B. 7743 at 7746; and *Re M.C.J.C. Holdings*, *supra* at 1136).

[105] The Commission did point out, however, that these were only some of the factors that might be considered, observing that "there may be others, and perhaps all of the factors we have mentioned may not be relevant in this or another particular case" (*Re M.C.J.C. Holdings*, *supra* at 1136).

[106] The Commission has also affirmed that sanctions should be fair and proportional to the sanctions imposed on others who were participants in the same matter (*Re Belteco Holdings*, *supra* at 7747; *Cartaway*, *supra* at 69).

[107] The sanctions imposed must be sufficient both to respond to the specific misconduct of the Respondent(s) and to send a message to other registrants about the importance of fulfilling their statutory duties.

ii. Rowan

a. Staff's Submissions

[108] Staff argues that Rowan's violations of the Act were serious. Staff points out that the Hearing Panel found in its Merits Decision that Rowan:

i. "repeatedly breached" section 107 of the Act by failing to file insider reports disclosing the trades in Biovail securities that he conducted in the Trust Accounts;

ii. failed to disclose to Biovail and the investing public through the 2002, 2003 and 2004 Management Information Circulars, the true extent of the Biovail securities over which he had control or direction in the Trust Accounts; and

iii. engaged in a "high volume" of discretionary trading in Biovail securities in the Trust Accounts during Biovail's blackout periods in 2002 and 2003.

(See: Merits Decision, *supra* at paras. 107, 108 128, 129 and 158)

Insider Reporting Violations

[109] With respect to the insider reporting violations, Staff submits that the scale of the violations at issue is an important consideration. In the present matter, Rowan failed to report 7,410 trades involving in excess of 37 million shares of Biovail during the period between January 1, 2002 and December 31, 2004.

[110] The evidence showed that of these trades, 3,690 transactions (involving over 19 million Biovail shares) occurred in the period after the Commission was granted the ability to impose an administrative penalty of up to $1,000,000 per violation of Ontario securities law, which became effective April 6, 2003.

[111] Staff submits that the sheer scale of the trading engaged in by Rowan while he was a director of Biovail and a member of its Audit Committee and for which no insider reports were filed is an aggravating feature in this case.

[112] Staff refers us to a number of cases involving, amongst other misconduct, the failure to file insider reports that have been determined by the Commission: *Re Meridian Resources Inc.* (2003), 26 O.S.C.B. 3727; *Re Riley* (1999), 22 O.S.C.B. 3549; *Re Robinson* (1996), 19 O.S.C.B. 2643 and 19 O.S.C.B. 3609); and a number of settlement agreements involving such failures: *Re Melnyk* (2007), 30 O.S.C.B. 5253 ("*Melnyk Settlement Reasons*"); *Re DXStorm. Com Inc.* (2007), 30 O.S.C.B. 4731; *Re Hinke* (2006), 29 O.S.C.B. 3769; *Re Freeman* (2006), 29 O.S.C.B. 2091; *Re Cheung* (2005), 28 O.S.C.B. 4685; *Re Crabbe Huson Group Inc.* (1999), 22 O.S.C.B. 4967; *Re Shefsky* (1999), 22 O.S.C.B. 3520). We have considered these cases below in our analysis.

[113] However, Staff further points out that none of these past cases addresses serious violations such as those committed by Rowan. They also point out that generally, these cases involved less than a hundred insider reporting violations; in some cases, dealing with settlements, the insiders had already taken steps to address their reporting violations.

[114] In addition, none of the previous decisions and settlements involved respondents who were registrants as well as corporate insiders. If anything, Staff submits that the circumstances of this case are more egregious as Rowan was a capital market professional and was expected to be knowledgeable about securities law obligations. According to Staff, a registrant should be presumed to have a higher level of awareness of the insider reporting regime and its importance to the capital markets. Rowan's failures are therefore significantly more serious than those previously considered.

[115] With respect to Rowan's failure to provide accurate and complete information to Biovail, Staff points out that the parties agreed, and the Hearing Panel found, that Rowan had disclosed his control over the Biovail shares contained in the Conset Account but not the shares contained in the Congor or Southridge Accounts. The information that Rowan provided to Biovail was in turn disclosed to the investing public through Biovail's Management Information Circulars in 2002, 2003, and 2004. The Hearing Panel found that Rowan had failed to disclose his control over between 3 and 4 million Biovail shares in each of these years to the general public.

[116] In Staff's view, the concealment of such a significant block of shares from the investing public, particularly when conducted by an experienced registrant in Rowan's position, can have significant consequences for public confidence in the integrity of Ontario's capital markets and this can be viewed as an aggravating feature concerning the conduct by Rowan.

Trading During Blackout Periods

[117] Staff points out that the Hearing Panel found in its decision at paragraphs 156, 157 and 158 that Rowan had engaged in a "high volume of discretionary trading" in Biovail shares in the Trust Accounts during Biovail blackout periods in 2002 and 2003.

[118] Staff also points out that the Commission has previously recognized the importance of adherence by directors and other insiders to corporate blackout periods (*Melnyk Settlement Reasons*, *supra* at para. 31).

[119] Staff submits that the extensive trading by Rowan during Biovail blackout periods is certainly an aggravating feature of his conduct. In Staff's view, if Rowan's trading had not been concealed, questions would have been asked by analysts and investors. In Staff's opinion, in face of public scrutiny, the trading would have come to a halt.

Rowan's Handling of the Southridge Account

[120] Finally, in reviewing Rowan's trading in the Southridge Account, and in particular his failure to properly document his client's instructions and the extent of his authority over the account, Staff points out that the Hearing Panel stressed that the importance of proper handling of discretionary trading accounts is amongst the most fundamental obligations of a registrant. In Staff's submissions, Rowan's failures with regard to this account were significant and reveal a troubling lax attitude towards his fundamental duties as a registrant.

Profits Resulting from Illegal Conduct

[121] Further, Staff submits that we should be mindful of the fact that the Hearing Panel found that Watt Carmichael earned a total of approximately $2,350,000 in commissions from trading in the Trust Accounts during the period from 2002 to 2004. Rowan owned approximately 29% of the shares of Watt Carmichael as at December 31, 2005. Staff submits that the proceeds of these trades, together with their distribution, provide a useful reference point for sanctions, particularly when determining the appropriateness and quantum of an administrative penalty.

b. Respondents' Submissions

[122] Counsel for the Respondents submits that the sanctions sought are not reasonable in light of the findings made by the Hearing Panel, and in particular when considering that the most serious allegations against Rowan have been dismissed by the Hearing Panel.

[123] Counsel acknowledges that Rowan has been found to have breached sections 107 and 127 of the Act in failing, as a director of Biovail, to file insider reports, in failing to provide complete and accurate information to Biovail for its information circulars, and in trading during the Biovail blackout periods. He submits that most of the facts underlying these findings were admitted in the Agreed Statement of Facts or not disputed at the hearing.

[124] Counsel submits that all of the findings against the other respondents arise from the unique and never to be repeated "concatenation" of Rowan's simultaneous role as an insider of a publicly traded company and as a registrant with a episodic discretionary trading authority. Rowan resigned as a director of Biovail in 2005. There has been no director of a publicly traded company at Watt Carmichael since his resignation. Watt Carmichael is prepared to undertake that none of its registrants will ever be officers or directors of publicly traded companies. Accordingly, these events that caused the findings against the Respondents will not be repeated.

[125] According to counsel, the sanctions sought against Rowan are vindictive. Counsel submits that Rowan has lost much of his business as a result of the allegations of insider trading and misleading the Commission. In the circumstances, he would have no prospect of re-entering the business at this stage of his career after any period of suspension, much less a two year suspension.

[126] Counsel submits that there is no risk of future harm by Rowan as he has been working in the industry for over thirty years since 1977, and has never been the subject of disciplinary proceedings. The events that give rise to the findings against Rowan occurred between five and seven years ago, in the period between 2002 and 2004.

[127] Further, counsel refers us to mitigating factors that we should be considering when making our decision on sanctions. Counsel emphasizes that all of the findings against Rowan relate to trading in shares in the Trust Accounts. None of the findings against Rowan arise in respect of trades of Biovail shares owned by him and that his shares were fully disclosed in the Biovail information circulars. When he traded his shares, Rowan filed insider reports. Rowan also observed Biovail blackout periods when trading his own Biovail shares.

[128] Counsel also filed character and personal references in the form of letters from various individuals for Rowan.

[129] Counsel submits that Rowan's dual role as a director of Biovail and as registered representative trading in Biovail was disclosed to the regulatory authorities at all times. Counsel states that the IDA knew that Rowan was a Biovail director, that he was the adviser in respect of the Congor and Conset accounts, that the Congor and Conset accounts traded heavily in Biovail before and after Rowan became a Biovail director.

[130] Counsel further points out that there was a lack of guidance from regulatory authorities respecting the obligations of a registered representative who trades clients' securities while being an insider of a publicly traded company. Rowan was candid about the facts that he treated shares held in the client trust accounts differently than those which he personally owned. Further, there was no dispute that Rowan traded Biovail securities held in the Trust Accounts during the Biovail blackout periods.

[131] Counsel submits that Rowan was mistaken as to the manner in which he was required to trade and report on Biovail trades in discretionary client accounts and that it cannot be repeated. Counsel submits that the only two factors that Staff cites in support of the harsh administrative penalty are the high volume of trading in Biovail and the fact that Rowan is a registered representative. Neither factor supports the administrative penalty sought by Staff nor suggests deliberate conduct.

[132] Counsel submits that consideration of the factors stated in *Re M.C.J.C. Holdings* highlights the fact that the remedy sought by Staff is inappropriate as:

(a) there was no profit made from the illegal conduct. It is Rowan's status as a director, which gave rise to the regulatory failures in this case. Rowan would have earned the same commissions if he were not a Biovail director, or if he had filed insider reports;

(b) the sanctions sought by the Commission would completely eviscerate the ability of Rowan to make a living. It is not reasonable to expect that Rowan could retain clients over one or two years while his registration is suspended;

(c) the enormous financial penalty sought of between $750,000 and $1,000,000 is draconian and seems to be targeted at bankrupting Rowan;

(d) there can be no realistic concern about Rowan participating in the capital markets "unchecked" in light of the fact that Rowan has done precisely this over the past three years without incident and the fact that the circumstances that gave rise to the regulatory breach in this case no longer exist;

(e) until these incidents, Rowan's reputation was unblemished. Neither he nor Watt Carmichael has ever been the subject of any regulatory proceeding;

(f) Rowan has already suffered tremendously as a result of the serious allegations levelled against him. The degree of shame and financial damage are already proportionate to the findings against him; and

(g) Rowan regrets not having taken definitive measures to clarify his reporting and trading obligations in the unique circumstances.

[133] Further, counsel submits that the cases referred to by Staff are of no assistance as respondents in those cases have either admitted to failing to meet insider reports obligations or have been convicted of the same. For instance, in the *Melnyk Settlement Reasons* the respondent was found not only to have failed to file insider reports but also to have misled the IDA, one of the allegations that was dismissed against Rowan. In *Re Hinke*, the respondent failed to file insider reports despite that he was required to do so by the terms of a settlement agreement and he had been advised by Staff of his obligation to file insider reports. They also refer to the recent case of *Re Wells Fargo Financial Corp.*, (2005), 28 O.S.C.B. 1791 ("*Wells Fargo*") where the Commission made the following statements, which although arising in a different context, are apposite in the present case:

> We've considered the various factors that have been listed in the cases to take into account in applying sanctions generally. But we believe, when it comes to deterrence and an administrative penalty, it is important to address factors such as wilfulness, negligence, carelessness, warnings that may have been issued, repeated violations, and also to look at the actual practice of Commission staff in the past in pursuing violations of the nature before us.
>
> While precedent, where available, may be helpful in setting sanctions, precedent is not necessary or determinative in any case. This is because the various factors we have to take into account will rarely be identical in each case. Sanctions must be tailored to the facts. This is almost self-evident when it comes to specially tailored orders such as a cease trading order, but it is equally applicable in applying monetary sanctions, in the form of administrative penalties, which are not meant to be penal or remedial, but are meant to be protective and preventive.

> The case before us is novel. It's the first one for an administrative penalty. It also represents a departure, in the sense that staff have indicated to us, and by their action today have shown, that they intend in the future to vigorously enforce late filings to the extent they haven't in the past.
>
> Therefore, this case is a signal to the marketplace of the increased vigilance on the part of staff and the danger to market participants in failing to comply with these technical, but necessary, requirements of our law.
>
> We note that the offences today are a first offence on the part of Wells Fargo. We also note that there is a certain shame factor. We are aware that the first time that a violation of a particular nature is enforced, perhaps it would be unjust to come forth with a huge administrative penalty, and, therefore, although $20,000 as the agreed amount appears on the light side, we think it is appropriate in this particular case.
>
> The street should not take this as a precedent and the indication of a scale that might be applied in the future. The warning signal has been given. Let the street take note.
>
> (*Wells Fargo*, *supra* at paras. 25-30 [emphasis added])

[134] Counsel submits that the circumstances of this case are analogous to the circumstances giving rise to the reasoning in *Wells Fargo*, as: there were no warnings issued in this case despite that the trading was known to the IDA; this is a first offence for Rowan; Rowan has endured not only the "shame" of being associated with very serious allegations such as insider trading, but has had to deal also with the harm to his business; this case is novel and arises from unique facts; this is the first case where the Commission has informed the marketplace that registered representatives must report personally for client accounts over which they have discretionary trading authority.

[135] Rowan also described, during his testimony, the impact of the proceeding on him. He indicated that the proceeding has been very harmful to him and exceedingly embarrassing both personally and professionally. He also mentioned that shortly after the initial public disclosure of the proceeding, some significant accounts that he managed left the firm, which would have produced at least $100,000 to $150,000 of gross revenues to the firm. He also mentioned that Biovail, which had been covering his legal fees until January 2008, is now seeking to recover from him the legal fees previously paid on his behalf. Finally, he testified that the sanctions sought by Staff, if ordered, would have a devastating impact on him, as his principal assets are his house and his ownership in Watt Carmichael.

[136] Counsel submits that the appropriate sanction against Rowan is a reprimand and a prohibition on Rowan to become a director of a reporting issuer, as this sanction is connected to the breaches at issue, all of which arise due to Rowan's former status as a Biovail insider. Counsel submits that the sanctions sought, other than the administrative penalty, are not sufficiently connected to the harm at issue to fall within the Commission's public interest jurisdiction. Further, the administrative penalty sought is completely disproportionate to the findings against Rowan.

c. Analysis

Rowan's Insider Reporting Violations

[137] As stated above, the Hearing Panel found that Rowan breached section 107 of the Act by failing to file insider reports disclosing the trades in Biovail shares that he conducted in the Trust Accounts:

> … Rowan, as an insider of Biovail by virtue of his role as a director of Biovail, was required to file insider reports with respect to trades of Biovail securities in the Trust Accounts in accordance with subsection 107(2) of the Act.
>
> (Merits Decision, *supra* at para. 107).

[138] The Hearing Panel also stressed that the requirement to file insider reports set out in section 107 of the Act serves two purposes:

(a) a deterrent purpose: insiders are less likely to engage in improper trading if such trading is subject to public scrutiny. Insider reporting allows the market and securities regulatory authorities to monitor insider transactions and take action if improper trading is identified; and

(b) a signaling purpose: investors are provided with information concerning the trading activities of insiders, and, by inference, the insiders' views concerning the prospects of the issuer, thereby enhancing market efficiency.

> (Merits Decision, *supra* at para. 78, citing *Report of the Attorney General's Committee on Securities Legislation in Ontario* (the "Kimber Report"), Toronto: Queen's Printer, 1965), paras. 2.02 – 2.05)

[139] The Hearing Panel acknowledged that "timely, accurate and efficient disclosure of information" is one of the primary means of achieving the purposes of the Act (Merits Decision, *supra* at para. 79). The Hearing Panel affirmed that the insider reporting requirements have an integral role to play in fulfilling this objective. Citing previous Commission jurisprudence regarding section 107 of the Act, it observed that:

> [t]hese requirements are intended to discourage trading with knowledge of material undisclosed information, and enhance investor confidence in the securities market. Additionally, the reports have been of use to market participants as an indicator of perceptions that insiders have about issuers and their prospects.
>
> (Merits Decision, *supra* at para. 81, citing *Notice and Request for Comments on Proposed Refinement of the Early Warning Regime and the Rules Regarding Insider Reporting, Takeover Bids and Control Block Distributions as they Apply to Investors in General, Including Portfolio Managers and Portfolio Clients* (1994), 17 O.S.C.B. 4438, quoted in *Re Robinson*, *supra* at para. 252)

[140] Indeed, the Commission has previously stated that it "considers a failure to comply with the reporting requirements of the Act respecting insider trading [to be] a serious breach of the Act" and a "*failure to meet these obligations should result in serious consequences*" (*Re Cheung*, *supra* at para. 18 [emphasis added]).

[141] Rowan failed to report a large number of trades involving shares of Biovail during the period between January 1, 2002 and December 31, 2004. Of these trades, it should be noted that a significant portion of the transactions occurred in the period after the Commission was granted the ability to impose an administrative penalty of up to $1,000,000 for each failure to comply with Ontario securities law.

[142] The Commission has previously considered a number of cases involving, amongst other misconduct, the failure to file insider reports (*Re Meridian Resources Inc.*, *supra*; *Re Riley*, *supra*; and *Re Robinson*, *supra*).

[143] The Commission has also approved a number of settlement agreements involving such failures (See: *Melnyk Settlement Reasons*, *supra*; *Re DXStorm. Com Inc.*, *supra*; *Re Hinke*, *supra*; *Re Freeman*, *supra*; *Re Cheung*, *supra*; *Re Crabbe Huson Group Inc.*, *supra*; *Re Shefsky*, *supra*).

[144] In the present case, the Hearing Panel took note of the "significant volume and frequency of trading" of Biovail shares in Trust Accounts, and thus, found that Rowan repeatedly breached the insider reporting requirements of section 107 of the Act (Merits Decision, *supra* at para. 108).

[145] As a registrant, the President of a registered broker and investment dealer, and a director and member of an audit committee of a reporting issuer, Rowan was expected to have a higher level of awareness of the insider reporting regime and its importance to the capital markets. Rowan's breaches of Ontario securities law are therefore significantly more serious than those previously considered.

The Failure to Make Complete and Accurate Disclosure to Biovail

[146] In the present case, the parties agreed and the Hearing Panel found that Rowan had disclosed his control over the Biovail shares contained in the Conset Account but not the shares contained in the Congor or Southridge Accounts. The information that Rowan provided to Biovail was in turn disclosed to the investing public including Biovail shareholders through Biovail's Management Information Circulars in 2002, 2003 and 2004.

[147] The Hearing Panel therefore found that Rowan had failed to disclose in Biovail's Management Information Circulars, which are provided to Biovail shareholders and others, between 3,000,000 and 4,000,000 Biovail shares over which he exercised or shared control in each of the three years. (See: Merits Decision, *supra* at para. 33). As the Hearing Panel observed:

> … It is incumbent on a director of a reporting issuer, through the filing of insider reports or otherwise, to ensure that the issuer has accurate, current information as to the director's ownership of or control or direction over securities of the issuer so as to enable the issuer to properly discharge its reporting obligations and failure by a director to do so, is, in our opinion, contrary to the public interest.
>
> (Merits Decision, *supra* at para. 127)

[148] Further, the Hearing Panel found that Rowan failed to disclose to Biovail and to the investing public the true extent of the Biovail shares in the Trust Accounts over which he exercised or shared control or direction:

> We find that Rowan's failure to report the Biovail holdings in the Congor and Southridge Accounts caused the disclosure contained in Management Information Circulars for 2002, 2003 and 2004 to be misleading or untrue or caused them to not state a fact that was required to be stated or that was necessary to make the statements in the circulars not misleading.
>
> The disclosure of only the securities in the Conset Trust in the Management Information Circular, plus the clear instructions on Form 30 to include the number of each class of voting securities of the issuer over which control or direction is exercised by the proposed director, should, at a minimum, have triggered further inquiries on the part of Rowan with regard to his obligation to disclose his holdings in the Congor and Southridge Accounts. But there is no convincing evidence that Rowan made such inquiries or consulted with legal counsel specifically about his responsibility to make such disclosure. …
>
> (Merits Decision, *supra* at paras. 125-126).

[149] We note that, in approving the Melnyk Settlement, the Commission made the following observations regarding the harm caused to the investing public as a result of disclosure violations of insider trading information:

> … Our insider reporting rules, and other requirements related to disclosure by insiders of their share ownership, are important elements of our securities law regime and disclosure of insider trading information is considered by many market participants to influence their own investment decisions. We do not discount the impact that public knowledge of the trading by the Trusts might have had on investment decisions made by investors and other shareholders of Biovail.
>
> (*Melnyk Settlement Reasons*, *supra* at para. 26)

[150] The failure to disclose such a significant block of shares to the investing public, particularly when done by an experienced registrant like Rowan is highly reprehensible. Such a failure can have significant consequences for public confidence in the integrity of Ontario's capital markets.

The Blackout Period Allegations

[151] The Hearing Panel found that Rowan engaged in a "high volume" of discretionary trading in the Biovail shares contained in the Trust Accounts during Biovail's blackout periods in 2002 and 2003. At all material times, Biovail had a clear and detailed policy concerning insider reporting and trading blackout periods. In the circumstances, Rowan's conduct was abusive of the integrity of the capital markets of Ontario, and contrary to the public interest.

[152] And as the Hearing Panel confirmed:

> [c]ompanies generally impose blackout periods on management and other insiders because of the increased risk posed by insiders having access to material undisclosed information during such periods. Blackout periods have played an important role in maintaining confidence in the capital markets for a considerable period of time.
>
> (Merits Decision, *supra* at para. 142)

[153] The Commission has previously recognized the importance of adherence by directors and other insiders to corporate blackout periods. In the *Melnyk Settlement Reasons* the Commission wrote:

> [c]orporate black-out policies form an important element of securities law compliance by public companies and their insiders. There should be a heavy onus on any insider who trades, or recommends trading, during a black-out period to demonstrate that he or she did so without knowledge of any material fact or material change. …
>
> (*Melnyk Settlement Reasons*, *supra* at para. 31).

[154] The Hearing Panel found that Rowan had engaged in a "high volume" of discretionary trading in Biovail shares in the Trust Accounts during Biovail's blackout periods in 2002 and 2003. Specifically, it concluded that:

> … in 2002 … there were acquisitions in excess of 2.5 million Biovail common shares at a cost of approximately U.S. $110 million, and dispositions in excess of 2 million Biovail common shares for proceeds of approximately U.S. $100 million during the 2002 Biovail Blackout Periods.
>
> In 2003 … there were acquisitions in excess of 2.5 million Biovail common shares at a cost of approximately US$90 million and in excess of 2.8 million Biovail common shares were sold for proceeds of approximately US $100 million. Further, more than 11,000 Biovail call options were acquired at a cost of approximately US$4 million …
>
> (Merits Decision, *supra* at paras. 156-157)

[155] As a result, the Hearing Panel said:

> We find there is ample evidence that Rowan engaged in a high volume of discretionary trading in Biovail securities in the Trust Accounts during the Biovail Blackout Periods in 2002 and 2003.
>
> We do not agree with the Respondents that blackout periods are simply a matter between the issuer and its insiders. Issuers establish blackout periods to ensure there will be no trading in the corporation's securities by persons who have access to undisclosed material information until that information has been disclosed to the market and sufficient time has elapsed to permit its evaluation. In this case, Rowan was an insider of Biovail and should have respected the Biovail Blackout Periods.
>
> … Rowan's conduct fell below the standards applicable to a registrant who is both in a senior position at a registered broker and investment dealer and director of a reporter issuer and a member of its Audit Committee. We find that, in the circumstances of this case, Rowan's conduct was abusive of the integrity of the capital markets of Ontario and contrary to the public interest.
>
> (Merits Decision, *supra* at paras. 158-160).

[156] The ASC has previously considered a case in which a director of a reporting issuer has traded in securities of the issuer in contravention of a blackout period (*Re Armstrong*, [2004] A.S.C.D. No. 1489). This case, however, did not involve trading as extensive as that conducted by Rowan or in a reporting issuer with the market capitalization and prominence of Biovail.

Proportionality of Sanctions

[157] Watt Carmichael earned a total of approximately $2,350,000 in commissions from trading in the Trust Accounts during the period from 2002 to 2004. Rowan owned approximately 29% of the shares of Watt Carmichael as at December 31, 2005. He was also "the registered representative at Watt Carmichael for the Conset, Congor and Southridge Accounts …" (Merits Decision, *supra* at para. 5). In this case, Staff submits the proceeds of these trades, together with their distribution, provide a useful reference point for sanctions, particularly when determining the appropriateness and quantum of an administrative penalty. However, while the proceeds may provide a useful reference point with respect to sanctions generally, section 127(1)9 provides the Commission with the power to impose an administrative penalty of not more than $1 million for each failure to comply with Ontario securities law. The Panel when determining the appropriate quantum of an administrative penalty must consider all relevant factors to ensure that the penalty meets the regulatory objective of general and specific deterrence as mandated by section 127(1)9 of the Act.

[158] Similarly, it is relevant to note the sanctions imposed on Melnyk as part of a resolution of related allegations. In a Settlement Agreement resolving the allegations against him, Melnyk agreed to the following sanctions:

- to pay an administrative penalty to the Commission in the amount of $750,000.00, to be allocated by the Commission to or for the benefit of third parties pursuant to section 3.4(2)(b) of the Act;
- to be prohibited from acting as a director of Biovail for a period of one year beginning June 30, 2007;
- to be reprimanded; and
- to pay to the Commission $250,000.00 representing a portion of the costs of the Commission's investigation in relation to this proceeding.

(*Melnyk Settlement Reasons*, *supra* at para. 33)

d. Conclusion

[159] Unlike in *Wells Fargo* where Wells Fargo Financial Canada Corporation, a public issuer in Ontario, engaged in a straightforward conduct which did not require extensive investigations, that is the failure to file financial information on a timely basis, the conduct of the Respondents in this case required an extensive investigation in connection with numerous serious allegations. This is not the only difference of course, but this is one that deserves highlighting at the outset. In *Wells Fargo*, the public issuer failed, on four occasions between February 2003 and October 2004, to file prospectus supplements on time as required by part 8 of Canadian Securities Administrators National Instrument 44-102 for shelf prospectus distributions of medium-term notes.

[160] The Panel in *Wells Fargo* considered the fact that this was the first time that a violation of that particular nature was enforced as a factor militating in favour of not imposing a huge administrative penalty. In its oral reasons, the Panel stated: "[t]he street should not take this as a precedent and the indication of a scale that might be applied in the future. The warning signal has been given. Let the street take note" (*Wells Fargo*, *supra* at para. 30). Although the Respondents argue that the same rationale should apply when considering sanctions against them, we do not agree. In particular, with respect to Rowan, we stress that his conduct was egregious and involved several violations of the Act that occurred on a repeated basis over an extended period of time.

[161] Rowan failed to comply with Ontario securities law by: breaching section 107 of the Act by failing to file insider reports in respect of trades in Biovail securities that he executed in the Trust Accounts; engaging in conduct contrary to the public interest by failing to provide complete and accurate information to Biovail concerning the number of Biovail common shares held in the Trust Accounts over which he exercised or shared control or direction; and engaging in conduct contrary to the public interest by trading in Biovail securities in the Trust Accounts during Biovail's Blackout Periods. Further, the Hearing Panel found that Rowan's conduct was contrary to the public interest.

[162] We also note that Rowan's testimony about the harm to himself and his firm as a result of the proceeding, were not substantiated by any financial record or documentary evidence. This is despite Staff's earlier request for particulars and documents supporting the claim about of any harm to his business.

[163] The 'character' and personal letters filed on Rowan's behalf, whilst impressive, do not excuse his egregious conduct.

[164] In light of the circumstances of this case, Rowan's conduct fell well below the standards applicable to both a registrant who was also the President of a registered broker and investment dealer and an insider who was a director of a reporting issuer and a member of its Audit Committee. In the circumstances, Rowan's conduct was abusive of the integrity of the capital markets of Ontario and contrary to the public interest.

[165] We consider these breaches to be serious when considered individually and collectively. Further, these were repeated failures to comply with Ontario securities law over an extended period spanning from 2002-2004. Section 127(1)9 of the Act provides for a maximum administrative penalty of $1 million for each failure to comply with Ontario securities law. We are mindful, however, that we must consider the administrative penalty in the context of the other sanctions imposed on a respondent. Further, we must consider the total effect of the sanction on the individual respondent as well as on the public in general, in order to appropriately penalize and to deter.

[166] In light of our determination on the issue of retrospectivity, we require that Rowan pay an administrative penalty in the amount of $520,000, to be allocated by the Commission to or for the benefit of third parties pursuant to section 3.4(2)(b) of the Act, in order to deter him from engaging in other conduct contrary to the Act and contrary to the public interest and to deter others from engaging in similar conduct. Were it not for our finding on the application of retrospectivity in this case, the administrative penalty would have been more in the range of $900,000 to $1,000,000.

[167] We therefore impose the following sanctions against Rowan:

(a) his registration is suspended for a period of 12 months;

(b) at the conclusion of his suspension of registration, his registration shall be subject to a condition that he not be approved to act in any supervisory role for a further period of 18 months;

(c) he is required to resign any position that he currently holds as a director or officer of a reporting issuer or a registrant;

(d) he is prohibited from becoming or acting as a director or officer of a reporting issuer or an affiliate of a reporting issuer for a period of 7 years;

(e) he is prohibited from becoming or acting as a director or officer of a registrant for a period of 3 years;

(f) he is reprimanded; and

(g) he shall pay an administrative penalty in the amount of $520,000 to the Commission pursuant to section 127(1)9, to be allocated by the Commission to or for the benefit of third parties pursuant to section 3.4(2)(b) of the Act.

iii. Carmichael

a. Staff's Submissions

[168] Staff submits that Carmichael, as a person responsible for Watt Carmichael's overall compliance with regulatory requirements, failed to ensure that Watt Carmichael had appropriate policies and procedures in place to discharge its regulatory responsibilities and failed to ensure that McKenney was providing proper oversight to the trading in the Trust Accounts.

[169] Staff submits that, as this Commission and other securities regulatory authorities have recognized, proper supervision by a registrant is a critical component of the securities regulatory system. Registered firms and those that are charged with supervisory responsibilities serve as gatekeepers with the responsibility of detecting misconduct promptly before there is harm or further harm to investors and the capital markets generally.

[170] As stated above, Watt Carmichael earned a total of approximately $2,350,000 in commissions from trading in the Trust Accounts during the period from 2002 to 2004. Carmichael owned approximately 44% of the shares of Watt Carmichael as at December 31, 2005.

[171] Staff submits that the proceeds of these trades, together with their distribution provide a useful reference point for sanctions, particularly when determining the appropriateness and quantum of an administrative penalty.

b. Respondents' Submissions

[172] Counsel submits that Carmichael is the Chairman and CEO of Watt Carmichael and is the driving force and the key operator of Watt Carmichael. The company, which has fifteen (15) employees, has operated under Carmichael's direction for years, including over the last two very trying years when the firm has laboured under the heavy cloud of allegations of insider trading and misleading the Commission.

[173] Counsel submits that Carmichael has never been the subject of a disciplinary proceeding and has a reputation for integrity and professionalism, as was demonstrated in the letters of support introduced during the hearing.

[174] Counsel stresses that the evidence shows that the Hearing Panel's findings arise in unique and complex supervisory circumstances that will not be repeated. The sanctions sought by Staff against Carmichael are completely out of proportion with the Hearing Panel's finding, and following Mithras, beyond the public interest jurisdiction of the Commission.

[175] Counsel submits that although the Commission has found that Watt Carmichael should have had additional policies in place, Carmichael did put relevant policies in place. Carmichael segregated Rowan's RR Code so that his trading could be reviewed. Specifically, he put in place regulations to prevent trading of Biovail in managed accounts, and he directed McKenney to ensure, to the extent possible, that Rowan was not trading with inside information.

[176] Carmichael stated that there was no policy in place to ensure that Rowan was not trading during blackout periods or filing insider reports. This fact, which has now been found to be a regulatory failing, must be put in context. Simply stated, counsel submits that there is no precedent for such a supervisory requirement.

[177] Counsel submits that there was extensive evidence led during the hearing respecting the extent to which the Trust Accounts were reviewed by the IDA. According to counsel, it is a significant mitigating factor that Watt Carmichael's policies and procedures were reviewed and approved by the IDA, which was itself aware of the circumstance. As Carmichael testified, he took comfort in the fact that the firm supervisory policies were consistently IDA-approved.

[178] Counsel further submits that the evidence before the Hearing Panel clearly shows that the question of whether or not there was an obligation on the part of Watt Carmichael to supervise Rowan's filing of insider reports and his trading in client accounts during blackout periods was not free from doubt. Carmichael was operating in unique supervisory circumstances without pre-existing guidance.

[179] Carmichael recognizes the Hearing Panel's findings and understands clearly that these will now serve as a guide to him and for others with supervisory responsibilities in relation to registrants who are also insiders of publicly traded companies. He accepts that a reprimand and caution for the future is necessary to signal to the market that the Commission views this as a serious matter.

[180] Counsel also filed character and personal reference letters from various individuals attesting to Carmichael's character.

[181] Carmichael also described, during his testimony, the impact of the proceeding on him and on his firm. He indicated that the proceeding has been very harmful to Watt Carmichael, to the individuals involved and caused a great deal of financial duress. He also mentioned that the proceeding has created embarrassment and that one of the partners left the firm resulting in a loss of $300,000 a year in net profit between commissions, fees and the like. He also mentioned that he personally incurred a loss of approximately 10% of the assets that he managed prior to the proceeding translating in a loss of $160,000 in gross revenues a year for Watt Carmichael over the last two years, and the company also incurred considerable legal fees.

c. Analysis

[182] As Chairman, CEO and acknowledged UDP of Watt Carmichael, Carmichael is responsible for the firm's overall compliance with regulatory requirements, and for overseeing the development and implementation of its compliance practices and procedures" (Merits Decision, *supra* at para. 346).

[183] The Hearing Panel found that Carmichael failed to ensure that Watt Carmichael had adequate policies and procedures in place to discharge its regulatory responsibilities and failed to ensure that McKenney was providing proper oversight to the trading in the Trust Accounts. (See: Merits Decision, *supra* at paras. 351-352).

[184] Carmichael testified that he joined the investment industry in 1973 and has spent his entire career at Watt Carmichael.

[185] Given his knowledge of the unique nature of the Trust Accounts, Carmichael should have ensured that Watt Carmichael had adequate policies, procedures and practices in place to ensure Watt Carmichael's compliance with its responsibilities.

[186] The Hearing Panel accepted Kleberg's expert evidence only as it related to industry standards for brokerage compliance practices. Kleberg testified about the division of supervisory responsibilities that is mandated within securities brokerages. Each firm must have a UDP who is responsible for the firm's overall compliance with regulatory requirements as well as overseeing the development and implementation of its compliance practices and procedures. Kleberg testified that these Trust Accounts warranted especially close supervision and required effective policies and procedures. In his words, the Trust Accounts were "screaming for attention". He highlighted the salient features of the Trust Accounts from a supervisory perspective:

(i) the accounts held a very large position in Biovail securities;

(ii) the accounts were highly concentrated in Biovail securities;

(iii) the accounts conducted very active trading in Biovail securities;

(iv) the registered representative assigned to the accounts was an insider of Biovail; and

(v) the registered representative held discretionary trading authority over the accounts.

[187] Kleberg also testified that the UDP should ensure that his CCO carries out his responsibilities including supervising the filing of insider reports.

[188] As Chairman, CEO and UDP, Carmichael was ultimately responsible for ensuring that Watt Carmichael had appropriate policies, procedures and practices in place, and for ensuring that McKenney, as CCO, satisfied his oversight responsibilities. Carmichael failed to fulfill this responsibility as Chairman, CEO and UDP, contrary to the public interest (Merits Decision, *supra* at para. 352).

[189] Carmichael, given his knowledge of the unique nature of the Trust Accounts, should have ensured that Watt Carmichael had adequate policies, procedures and practices in place to ensure Watt Carmichael's compliance with its responsibilities.

[190] The Commission has previously considered cases involving supervisory failures, including failures by securities firms, UDPs and CCOs (*Re Marchment & MacKay Ltd.* (1999), 22 O.S.C.B. 4705; *Re E.A. Manning Ltd.* (1995), 19 O.S.C.B. 5317). The Commission, together with other Canadian securities regulators, has also considered a number of settlement agreements concerning allegations of inadequate supervision. These cases reflect a wide range of supervisory failures, not all of which are directly comparable to the present case (*Re Union Securities Ltd.* 2006 BCSECCOM 220; *Re Simpson* (2005), 28 O.S.C.B. 7126; *Re Bruce* (2004) 27 O.S.C.B. 9319 and 9320; *Re Yorkton Securities Inc.* (2002) 25 O.S.C.B. 1106; *Re RT Capital Management Inc.* (2000) 23 O.S.C.B. 5117, 23 O.S.C.B. 5118, 23 O.S.C.B. 5177; *Re Yorkton Securities Inc.* (1994) 17 O.S.C.B. 5386).

[191] Although Carmichael's violations of the Act were not as significant as those of Rowan, we nevertheless find that Carmichael as Chairman, CEO and acknowledged UDP of Watt Carmichael had an important leadership role in the brokerage firm and was responsible to ensure that the firm and its employees operated in compliance with Ontario securities law by adopting appropriate policies, procedures and practices. Carmichael, in light of his role and long–standing career in the industry, should not have abdicated his responsibilities. In particular, Carmichael's failure to supervise trading by Rowan and to address the issues arising from Rowan's dual role as a director of Biovail and as a registered representative trading in Biovail securities amounted to serious misconduct.

[192] We also note that Carmichael's testimony about the harm to himself and his firm as a result of the proceeding, was not substantiated by any financial record or documentary evidence. This is despite Staff's earlier request for particulars and documents supporting the claim about any harm to the business.

[193] Carmichael failed to comply with Ontario securities law by failing to "… adequately supervise Rowan's trading in Biovail securities in the Trust Accounts …"(Merits Decision, *supra* at para. 345). The breaches in this case are serious when considered individually and collectively. Further, they were repeated failures to comply with Ontario securities law over an extended period from 2002-2004.

[194] Section 127(1)9 of the Act provides for a maximum administrative penalty of $1 million for each failure to comply with Ontario securities law. We are mindful however, that we must consider the administrative penalty in the context of the other sanctions imposed on a respondent. Further, we must consider the total effect of the sanction on the individual respondent as well as on the public in general, in order to appropriately deter the respondent and others and do justice in the circumstances.

[195] As stated above, Watt Carmichael earned a total of approximately $2,350,000 in commissions from trading in the Trust Accounts during the period from 2002 to 2004. A significant number of shares of Watt Carmichael, approximately 44%, were owned by Carmichael as at December 31, 2005. In this case, Staff submits the proceeds of these trades, together with their distribution, provide a useful reference point for sanctions, particularly when determining the appropriateness and quantum of an administrative penalty. However, while the proceeds may provide a useful reference point with respect to sanctions generally, section 127(1)9 provides the Commission with the power to impose an administrative penalty of not more than $1 million for each failure to comply with Ontario securities law. The Panel when determining the appropriate quantum of an administrative penalty must consider all relevant factors to ensure that the penalty meets the regulatory objective of general and specific deterrence as mandated by section 127(1)9 of the Act.

[196] Having regard to all of the circumstances, including the sales compliance reviews by IDA/IIROC and the impressive character and personal letters concerning Carmichael's background and public service and in light of our determination on the issue of retrospectivity, we require that Carmichael pay an administrative penalty in the amount of $250,000, to be allocated by the Commission to or for the benefit of third parties pursuant to section 3.4(2)(b) of the Act, in order to deter him from engaging in other conduct contrary to the Act and contrary to the public interest and to deter others from engaging in similar conduct. Were it not for our finding of the application of retrospectivity in this case, the administrative penalty would have been more in the range of $450,000 to $550,000.

[197] In considering a prohibition on Carmichael from acting as a director or officer of a registrant, we are cognizant of the effect that such prohibition would have on a small firm such as Watt Carmichael, when combined with our decision to impose a suspension on its President. Although, in other circumstances, we would have imposed a longer prohibition, we have determined that a 45-day suspension is appropriate in the circumstances.

d. Conclusion

[198] We therefore impose the following sanctions against Carmichael:

(a) he is required to resign any position that he currently holds as a director or officer of a registrant;

(b) he is prohibited from becoming or acting as a director or officer of a registrant for a period of 45 days;

(c) a condition is imposed on his registration that he not be approved to act in any supervisory role for a period of 45 days;

(d) he is reprimanded; and

(e) he shall pay an administrative penalty in the amount of $250,000, to be allocated by the Commission to or for the benefit of third parties pursuant to section 3.4(2)(b) of the Act.

iv. McKenney

a. Staff's Submissions

[199] Staff submits that the CCO is responsible for creating awareness of compliance issues within the firm, monitoring adherence with regulatory requirements and ensuring compliance with such requirements (Merits Decision, *supra* at para. 330).

[200] Staff points out that McKenney admitted being aware of the concentration of Biovail securities in the Trust Accounts, the unusually high volume of trading in the Biovail securities in the Trust Accounts, that these were offshore accounts and that Melnyk was the settlor (Merits Decision, *supra* at para. 332).

[201] According to Staff, in spite of the clear risks McKenney failed to properly supervise Rowan's trading in the Trust Accounts. In particular, McKenney, as CCO, failed to ensure that:

(a) Rowan filed insider reports relating to his trading in Biovail securities in the Trust Accounts;

(b) Rowan ceased trading in Biovail securities in the Trust Accounts during Biovail Blackout Periods; and

(c) Rowan ceased trading in Biovail securities in the Trust Accounts during periods where he was in possession of material undisclosed information concerning Biovail.

(Merits Decision, *supra* at para. 333)

[202] The Hearing Panel found that McKenney "made only sporadic and inadequate attempts to determine when Rowan had knowledge of information not generally disclosed" (Merits Decision, *supra* at para. 334).

b. Respondents' Submissions

[203] Counsel submits that, like the other respondents, McKenney has never been the subject of any regulatory proceedings. He began working in the industry as a clerk/messenger almost 50 years ago. Counsel submits that McKenney did take steps to monitor Rowan's trading in Biovail. He established a segregated code for trading in Biovail by Rowan, which facilitated monitoring of Biovail trading by Rowan in daily reviews. He reviewed trading on a daily basis and consistent with the Hearing Panel's findings, never found anything that would indicate that Rowan was engaged in insider trading.

[204] Counsel submits that McKenney testified that he did not consider it to be part of his supervisory responsibilities to monitor Rowan's compliance with Biovail blackout periods or to monitor whether Rowan was filing insider reports for trades in client accounts. As already submitted, there was no law, regulation or prior finding of this Commission which would impose a specific supervisory obligation to review for such matters. Counsel states that the Commission has now, through its Merits Decision, provided guidance to the Ontario capital markets for the future.

[205] According to counsel, McKenney suffers from poor health and has retired, and any further action against McKenney would be inappropriate in the circumstances.

c. Analysis

[206] McKenney joined the investment industry in 1962, and joined Watt Carmichael in 1996. McKenney was at all material times the Chief Financial Officer and CCO of Watt Carmichael (Merits Decision, *supra* at para. 9).

[207] The Hearing Panel found that, as CCO of Watt Carmichael, McKenney was responsible for supervising Rowan's trading to ensure compliance and failed to do so. The Hearing Panel found that his failures include:

(a) making "only sporadic and inadequate attempts" to determine when Rowan had knowledge of undisclosed information;

(b) accepting "information provided by a registered representative at face value" rather than performing independent checks;

(c) relying on "happenstance" to determine when Rowan was attending a Biovail Board or Audit Committee meeting; and

(d) failure to adhere to Watt Carmichael's own policies by only monitoring trading in Biovail securities in accounts controlled by Rowan

(Merits Decision, *supra* at paras. 334-342).

[208] The CCO should be vigilant and ensure that all the employees and senior staff are aware of compliance issues within the firm and monitor compliance with regulatory requirements. Kleberg testified that industry standards would not generally require the CCO to monitor adherence to corporate blackout periods by a brokerage client who is an insider of a reporting issuer. However, it was his view that where a registered representative who is also an insider of a reporting issuer ("RR/insider") has discretionary authority to trade in securities of the reporting issuer, close supervision by the CCO is required to ensure that an RR/insider does not trade in the issuer's securities during the issuer's blackout periods. Kleberg stated that this monitoring would not be difficult since the CCO could simply ask the reporting issuer to notify him of any blackout periods. This monitoring was required to ensure that Rowan did not transmit any inside information concerning Biovail to other investment advisors or clients.

[209] We also considered the fact that McKenney admitted being aware of the concentration of Biovail securities in the Trust Accounts, the unusually high volume of trading in the Biovail securities in the Trust Accounts, that these were offshore accounts and that Melnyk was the settlor. In our view, McKenney should at least have met the industry standard and monitored Biovail trading in all accounts at the firm.

[210] McKenney failed to properly supervise Rowan's trading in the Trust Accounts. In particular, McKenney, as CCO, failed to ensure that:

(a) Rowan filed insider reports relating to his trading in Biovail securities in the Trust Accounts;

(b) Rowan ceased trading in Biovail securities in the Trust Accounts during Biovail Blackout Periods; and

(c) Rowan ceased trading in Biovail securities in the Trust Accounts during periods where he was in possession of material undisclosed information concerning Biovail

(Merits Decision, *supra* at para. 333).

[211] McKenney "made only sporadic and inadequate attempts to determine when Rowan had knowledge of information not generally disclosed" (Merits Decision, *supra* at para. 334).

d. Conclusion

[212] We have taken into consideration the above mentioned important factors and have determined to impose the following sanctions against McKenney:

(a) he is required to resign any position that he currently holds as a director or officer of a registrant;

(b) he is prohibited from becoming or acting as a director or officer of a registrant for a period of 12 months;

(c) he shall have a condition imposed on his registration that he not be approved to act in any supervisory role for a period of 12 months; and

(d) he is reprimanded.

v. Watt Carmichael

a. Staff's Submissions

[213] Staff submits that in reviewing the conduct of Carmichael, McKenney and Watt Carmichael, the Hearing Panel concluded that two senior officers of Watt Carmichael had failed in their duty under Commission Rule 31-505 to supervise Rowan's trading activities in the Trust Accounts.

[214] Further, Staff refers us to the Merits Decision where the Hearing Panel found that Watt Carmichael's compliance policies, procedures and practices were inadequate in that Watt Carmichael failed to ensure the containment of inside information and failed to properly document its compliance activities. Staff also stress that Watt Carmichael failed to adequately supervise Rowan's trading in Biovail securities in the Trust Accounts. Staff points out that these are serious findings about the failures of the firm.

[215] Staff submits that failure to properly supervise has significant consequences for the securities regulatory regime as a whole, and thus calls for a robust response in order to protect the public interest.

b. Respondents' Submissions

[216] The Respondents submit that their submissions respecting Carmichael and McKenney apply to Watt Carmichael as well. Watt Carmichael has undertaken never to have an officer as a director of a public company as a registrant, which ensures that the circumstances giving rise to the penalties against Watt Carmichael will never be repeated.

[217] The Respondents argue that the suggestion that Watt Carmichael undergo an independent review of its compliance procedures is difficult to comprehend in light of the evidence that Watt Carmichael has undergone six sales compliance reviews by the IDA between 1997 and 2005. On each occasion, its compliance procedures have been found to be compliant by the IDA. Watt Carmichael will be subject to a further IDA Sales Compliance review, in the normal course, in November 2009. It is not clear to the Respondents what a further third party compliance review is intended to accomplish.

[218] Counsel submits that, not only are the sanctions sought by Staff completely out of proportion with the findings against the Respondents, they also ignore Watt Carmichael's vulnerability to sanction. Watt Carmichael is a small firm, which prior to these allegations, has enjoyed an excellent regulatory reputation in the industry for over thirty years. It has fifteen (15) employees in total, may of whom have been at the firm for decades. The allegations levelled against the Respondents, particularly the devastating allegations that were not made out, have had a injurious impact upon the firm and its employees.

c. Analysis

[219] The Hearing Panel found that Watt Carmichael's compliance policies, procedures and practices were inadequate in that they failed to address the inherent risk in Rowan's dual role and that it failed to adequately supervise Rowan's trading in Biovail securities in the Trust Accounts:

> … Watt Carmichael's compliance policies, procedures and practices were inadequate in that they failed to address the inherent risk in Rowan's dual role as registered representative for the Trust Accounts with discretionary trading authority and as an insider of Biovail.
>
> In particular, Watt Carmichael failed to adequately supervise Rowan's trading in Biovail securities in the Trust Accounts, in that Watt Carmichael failed to ensure the containment of inside information, failed to ensure Rowan's compliance with insider trading and disclosure rules and the Biovail Blackout Policy, and failed to properly document its compliance activities
>
> (Merits Decision, *supra* at paras. 344-345).

[220] This severe inadequacy at Watt Carmichael was emphasized by Kleberg who testified that he had examined Watt Carmichael's Policies and Procedures Manual to examine its treatment of insider information containment. His conclusion was that "it did not address the appropriate procedures". Kleberg concluded that the Trust Accounts warranted especially close supervision and required effective policies and procedures.

[221] We agree with Kleberg when he said Watt Carmichael's Policies and Procedures regarding containment of insider information did not address appropriate issues and procedures.

d. Conclusion

[222] We conclude that Watt Carmichael must undergo an independent review of its compliance structure as well as its procedures relating to the handling of confidential information and conflicts of interest.

[223] In light of our determination on the issue of retrospectivity, we require that Watt Carmichael pay an administrative penalty in the amount of $450,000, to be allocated by the Commission to or for the benefit of third parties pursuant to section 3.4(2)(b) of the Act, in order to deter Watt Carmichael from engaging in other conduct contrary to the Act and contrary to the public interest and to deter others from engaging in similar conduct. Were it not for our finding of the application of retrospectivity in this case, the administrative penalty would have been more in the range of $850,000 to $1,000,000.

D. What are the Appropriate Costs in this Case?

i. Staff's Submissions

[224] Staff submits that the Respondents should be ordered pursuant to section 127.1 of the Act to jointly and severally pay a portion of the costs in the amount of $283,691.40 towards the costs of the hearing on the merits. Staff notified the Respondents of its intention to seek costs in this matter right from the outset of the proceeding. A request for costs was included in the initial Notice of Hearing dated July 28, 2006.

[225] In preparing the bill of costs, Staff has employed the methodology expressly approved by the Commission in three recent decisions regarding costs awards: *Re Cornwall* (2008), 31 O.S.C.B. 4840; *Re Momentas Corp.* (2007), 30 O.S.C.B. 6475; *Re Ochnik* (2006), 29 O.S.C.B. 5917.

[226] Specifically, as in those cases, Staff has provided both its bill of costs and copies of the timesheets supporting the hourly figures claimed. These timesheets provide dates, numbers of hours worked and details of the tasks performed by each of the individuals listed in the bill of costs.

[227] As in the previous cases, the present bill of costs employs the hourly rates approved by the Commission, and excludes any time spent by students-at-law, law clerks and assistants. The rates that are applied are: (1) $205 an hour for litigation staff; and (2) $185 for investigation employees.

[228] In addition, as in the *Re Ochnik* matter, Staff is only seeking recovery of the time spent in preparing for the hearing on the merits. The hours claimed begin from the date of approval of Melnyk's settlement agreement on May 19, 2007 and end on September 7, 2007. They therefore exclude the costs of the lengthy investigation of this matter, and also do not include the time spent preparing for and attending the present hearing regarding sanctions. Further, Staff does not seek the costs associated with the response to the constitutional challenge brought by the Respondents.

[229] Finally, the hours claimed for two staff members, Johanna Superina and Rima Pilipavicius, have been reduced to take account of tasks which related, at least in part to matters not directly connected to the present case. The remaining time claims for all Staff members directly relates to the hearing on the merits and its preparation.

[230] Staff points out that as part of its settlement agreement, Melnyk was required to pay $250,000 in costs, which represented a portion of the costs of the Commission's investigation in relation to this proceeding.

[231] Staff therefore submits that its request for costs is both proportionate and reasonable in all of the circumstances.

ii. Respondents' Submissions

[232] The Respondents submit that no costs should be awarded against them in this matter. In support of this submission, the Respondents cite subsection 17.1(2) of the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 ("SPPA") which provides that a tribunal may not make a costs order "under this section" unless a party's conduct has been unreasonable or the party has acted in bad faith.

[233] The Respondents submit that they did not act unreasonably or in bad faith in defending themselves against the charges laid by Staff, as is evidenced by the fact that the most serious allegations were dismissed.

[234] Further, they argue that it is unfair that section 127.1 of the Act contemplates an award of costs in favour of the Commission, but not in favour of the Respondents. They rely on a decision that recognized the failings of a one-sided power to award costs. They rely on *Credifinance Securities Limited*, [2006] I.D.A.C.D. No. 30, which states at paragraph 56:

> In recent years, there has been a trend to the awarding of quite substantial costs in these cases. We think that care should be exercised so that fear of attracting an award of very large costs does not have the effect of inhibiting a Member, or an approved person, from advancing a defence which it thinks is meritorious. It is also worth keeping in mind, when thinking about costs, that a successful respondent cannot get its costs from the IDA. Since the power to award costs is one-sided, we think that a conservative approach is not unwarranted.

[235] Further, they submit that we should take into consideration the fact that four of the eight allegations were not made out and accordingly, this should affect the costs award against the Respondents. They rely on *Octagon Capital Corporation*, [2007] I.D.A.C.D. No.16 at paragraph 78, which states that:

> As we commented above, a considerable amount of hearing time required involved Counts 2 and 3 in the Notice of Hearing. Octagon was entirely successful on those two matters. We find it unfair, under all these circumstances, to require Octagon to pay the IDA its costs for Count 1 when Octagon cannot recover any costs from the IDA for successfully defending itself on Counts 2 and 3. We, therefore, conclude that there should be no order for costs.

iii. Analysis

[236] The Commission's jurisdiction to award costs is established by section 127.1 of the Act (enacted in December 1999). The application of that provision is expressly contemplated by subsection 17.1(6) of the SPPA. A costs award by the

Commission is not made "under" section 17.1 of the SPPA as argued by the Respondents. This provision does not apply to the present proceeding.

[237] In considering a request for an award of costs related to the Commission's investigation/hearing, the Commission has identified a number of additional factors which should be considered, including:

(a) the importance of early notice of an intention to seek costs;

(b) the seriousness of the allegations and the conduct of the parties;

(c) the presence or absence of abuse of process by any respondent;

(d) the conduct of any respondent as it affects investigative and hearing costs; and

(e) the reasonableness of the costs requested by Staff.

(*Re Ochnik*, *supra* at para. 29.)

[238] These would apply to the determination of a request for an award of the hearing costs. We consider these factors below when determining the appropriate amount of costs, if any, that the Respondents should be required to pay pursuant to subsection 127.1 of the Act.

[239] Further, we have also considered the unique circumstances of this case, and the fact that four of the eight allegations were not made out, in determining the appropriate amount of costs that should be paid by the Respondents. In particular, we considered the fact that the vast majority of the evidence led at the hearing was directed at allegations that were not made out.

[240] Based on the submissions and information presented by Staff, we have assessed that the total costs payable by the Respondents should be approximately half of $283,691.40. In determining this amount we have considered the facts that many of the allegations against the Respondents were not proven by Staff and represented a substantial part of the case.

iv. Conclusion

[241] The Respondents shall jointly and severally pay costs and disbursements fixed at $140,000 to the Commission pursuant to subsection 127.1(2).

VI. SUMMARY OF OUR SANCTIONS AND COSTS ORDER

[242] Our order reflects the seriousness of the securities law violations that occurred in this matter, and imposes sanctions that will not only deter the Respondents but also like-minded people from engaging in future conduct that violates securities law.

[243] Accordingly, by Order dated December 21, 2009, we order that:

With respect to Rowan:

(a) his registration is suspended for a period of 12 months pursuant to section 127(1)1 of the Act;

(b) at the conclusion of his suspension of registration, his registration shall be subject to a condition that he not be approved to act in any supervisory role for a further period of 18 months pursuant to section 127(1)1 of the Act;

(c) he is required to resign any position that he currently holds as a director or officer of a reporting issuer or registrant pursuant to sections 127(1)7 and 127(1)8.1 of the Act;

(d) he is prohibited from becoming or acting as a director or officer of a reporting issuer or an affiliate of a reporting issuer for a period of 7 years pursuant to section 127(1)8 of the Act;

(e) he is prohibited from becoming or acting as a director or officer of a registrant for a period of 3 years pursuant to section 127(1)8.2 of the Act;

(f) he is reprimanded pursuant to section 127(1)6 of the Act;

(g) he shall pay an administrative penalty pursuant to section 127(1)9 of the Act in the amount of $520,000, to be allocated by the Commission to or for the benefit of third parties pursuant to section 3.4(2)(b) of the Act.

With respect to Carmichael:

(a) he is required to resign any position that he currently holds as a director or officer of a registrant pursuant to section 127(1)8.1 of the Act;

(b) he is prohibited from becoming or acting as a director or officer of a registrant for a period of 45 days pursuant to section 127(1)8.2 of the Act;

(c) a condition is imposed on his registration pursuant to section 127(1)1 of the Act that he not be approved to act in any supervisory role for a period of 45 days;

(d) he is reprimanded pursuant to section 127(1)6 of the Act; and

(e) he shall pay an administrative penalty pursuant to section 127(1)9 of the Act in the amount of $250,000, to be allocated by the Commission to or for the benefit of third parties pursuant to section 3.4(2)(b) of the Act.

With respect to McKenney:

(a) he is required to resign any position that he currently holds as a director or officer of a registrant pursuant to section 127(1)8.1 of the Act;

(b) he is prohibited from becoming or acting as a director or officer of a registrant for a period of 12 months pursuant to section 127(1)8.2 of the Act;

(c) a condition is imposed on his registration pursuant to section 127(1)1 of the Act that he not be approved to act in any supervisory role for a period of 12 months; and

(d) he is reprimanded pursuant to section 127(1)6 of the Act.

With respect to Watt Carmichael:

(a) it is required to undergo an independent review of its compliance structure as well as its procedures relating to the handling of confidential information and conflicts of interest pursuant to section 127(1)4 of the Act. This review should encompass the following points:

  (i) it is to be conducted by an independent party approved by Staff;

  (ii) it is to be conducted at the expense of Watt Carmichael;

  (iii) it is required to implement any changes recommended by the expert within reasonable times frames set out by the expert after consultation with Watt Carmichael and Staff; and

  (iv) Watt Carmichael is to provide Staff with a copy of the report and recommendations of the expert and with progress reports concerning the implementation of the report's recommendations;

(b) it is reprimanded pursuant to section 127(1)6 of the Act; and

(c) it shall pay an administrative penalty in the amount of $450,000 pursuant to section 127(1)9 of the Act, to be allocated by the Commission to or for the benefit of third parties pursuant to section 3.4(2)(b) of the Act.

On the issue of costs:

(a) pursuant to subsection 127.1(2) of the Act, the Respondents shall jointly and severally pay to the Commission $140,000 in costs and disbursements.

Dated this 21st day of December, 2009.

"Patrick J. LeSage"

"Suresh Thakrar"

"David L. Knight"

3.1.2 MI Developments Inc.

IN THE MATTER OF
THE SECURITIES ACT,
R.S.O. 1990, c. S.5, AS AMENDED

AND

IN THE MATTER OF
MI DEVELOPMENTS INC.

REASONS AND DECISION

Hearing:	September 9 and 10, 2009		
Panel:	James E. A. Turner	–	Vice-Chair
	Paulette L. Kennedy	–	Commissioner
Counsel:	Thomas G. Heintzman René R. Sorell Andrew B. Matheson (McCarthy Tétrault LLP)	–	For Greenlight Capital, Inc.
	Michael E. Barrack Jessica S. Bookman (ThorntonGroutFinnigan LLP) Shane Priemer (Voorheis & Co. LLP)	–	For Farallon Capital Management, L.L.C.,Hotchkis and Wiley Capital Management, LLC, Donald Smith & Co. Inc., Owl Creek Asset Management, L.P.,North Run Capital, LP, Pzena Investment Management, LLC
	Kent E. Thomson Andrea L. Burke James W. E. Doris Vincent A. Mercier Derek D. Ricci (Davies Ward Phillips & Vineberg LLP)	–	For MI Developments Inc.
	Laura K. Fric Emmanuel Z. Pressman Craig T. Lockwood (Osler, Hoskin & Harcourt LLP)	–	For Magna Entertainment Corp.
	Sean F. Dunphy Edward J. Waitzer Amanda Linett Ellen Snow (Stikeman Elliott LLP)	–	For Fair Enterprise Limited
	James Sasha Angus Michelle Vaillancourt Usman Sheikh Naizam Kanji Shannon O'Hearn Jason Koskela	–	For Staff of the Ontario Securities Commission

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REASONS AND DECISION

I. OVERVIEW

[1] This matter involved the hearing by the Ontario Securities Commission (the "**Commission**") of two applications (i) an application dated July 10, 2009 by Farallon Capital Management, L.L.C., Hotchkis and Wiley Capital Management, LLC, Donald Smith & Co. Inc., Owl Creek Asset Management, L.P., North Run Capital, LP and Pzena Investment Management, LLC, on behalf of themselves and funds and entities under their management (collectively, the "**Shareholders**"), and (ii) an application dated March 30, 2009 (as amended and restated on April 9, 2009 and July 13, 2009) by Greenlight Capital, Inc. ("**Greenlight**"), (the Shareholders and Greenlight are collectively referred to in these reasons as the "**Applicants**" and the two applications are collectively referred to as the "**Applications**").

[2] The Applications are made pursuant to sections 104 and 127 of the *Securities Act*, R.S.O. 1990, c. S.5, as amended (the "**Act**") and relate to compliance by MI Developments Inc. ("**MID**") with Multilateral Instrument 61-101 – *Protection of Minority Security Holders in Special Transactions* ("**MI 61-101**") in connection with two groups of transactions (i) a new loan in the amount of US$125 million made by MID to Magna Entertainment Corp. ("**MEC**") (the "**November Loan**"), extensions by MID in favour of MEC of existing loans in the amount of US$312 million (the "**Loan Extension**") and a proposed corporate reorganization of MID described in paragraph 36 of these reasons (the "**November Reorganization Proposal**"), all publicly announced on November 26, 2008, and (ii) two transactions between MID and MEC related to the voluntary filings made by MEC under Chapter 11 of the United States Bankruptcy Code (the "**Bankruptcy Filings**"), being the debtor-in-possession financing by MID of MEC of up to US$62.5 million (the "**DIP Financing**") and a so-called "stalking horse" offer in the amount of US$195 million made by MID to acquire certain assets from MEC (the "**Stalking Horse Bid**"), both publicly announced on March 5, 2009.

[3] The November Loan, the Loan Extension and the November Reorganization Proposal are collectively referred to in these reasons as the "**November Transactions**". The DIP Financing and the Stalking Horse Bid are collectively referred to as the "**March Transactions**".

[4] The Applicants sought a determination that the November Transactions and the March Transactions violated MI 61-101 because minority shareholder approval ("**Minority Approval**") of those transactions was required and not obtained and because a formal valuation was required and not provided. The Applicants also sought an order or orders from the Commission that would, in effect, prohibit MID from relying on any exemption from the requirement to obtain Minority Approval under MI 61-101 in connection with any future related party transactions between MID and MEC.

[5] On August 11, 2009, the Commission issued a Notice of Hearing pursuant to subsection 104(1) and section 127 of the Act, scheduling a hearing for September 9 and 10, 2009 to consider the Applications.

[6] On August 20, 2009, following a motions hearing, the Commission issued an order granting MEC limited intervener status to make oral and written submissions with respect to the appropriateness and scope of any Commission order in disposing of the Applications. The Commission also granted Fair Enterprise Limited ("**Fair Enterprise**") limited intervenor status to adduce oral and written evidence regarding its involvement in the transactions and agreements to which it is a party and that are at issue in this matter. On August 21, 2009, the Commission issued a protective order related to the confidentiality of non-public documents produced by the parties.

[7] On September 3, 2009, the Commission heard motions made by the Applicants for production of documents. The motions resulted in orders for certain pre-hearing production.

[8] The hearing of the Applications on the merits was held on September 9 and 10, 2009. As noted above, the Applicants alleged that the November Transactions and the March Transactions were related party transactions between MID and MEC, and that MID failed to comply with the requirement to obtain Minority Approval and to prepare a formal valuation under MI 61-101 in connection with those transactions. The Applicants alleged that MID's conduct raises significant public interest and public policy issues that required intervention by the Commission. The Applicants submitted that MID disregarded the legitimate interests of its shareholders in entering into a series of related party transactions that resulted in substantial value destruction for shareholders and that the Commission should exercise its discretion to ensure that the legitimate objectives of securities regulation are met in connection with those transactions.

[9] MID denied that it failed to comply with MI 61-101. MID submitted that the November Transactions (assuming the Loan Extension was, in fact, a related party transaction) were all "downstream transactions" for purposes of MI 61-101 and therefore Minority Approval and a formal valuation were not required. MID submitted, in the alternative, that the related party transactions (again, assuming the Loan Extension was a related party transaction) were exempt from Minority Approval and the valuation requirement under the 25% market capitalization exemption in MI 61-101.

[10] MID submitted that the Loan Extension was not a related party transaction within the meaning of MI 61-101 because it did not constitute a material amendment to the existing loans to which it related.

[11] MID also submitted that the Commission does not have the authority to grant the requested relief under either section 104 or section 127 of the Act, and that, even if we concluded that we could grant such relief, we should not do so in the circumstances.

[12] MID submitted further that the granting of the requested relief would seriously undermine MID's investment in MEC represented by its outstanding secured loans to MEC. MID submitted that the November Loan, the Loan Extension and the March Transactions were intended by MID primarily to protect and preserve the value of that investment.

[13] MEC submitted that if the order sought by the Applicants were granted, it would be punitive and would have a devastating financial impact on MEC. We were told that, if the order were granted, MEC would run out of funds before a MID minority shareholder vote could be held and that would lead to a fire sale of MEC's assets. MEC also submitted that if such an order were granted, MEC's ability to maximize value in the ongoing auction of its assets would be severely prejudiced because MID would not be permitted to fully participate.

[14] On September 14, 2009, we issued an order dismissing the Applications and releasing MID from its undertaking provided to Staff of the Commission ("**Staff**") on May 11, 2009 that it would not enter into certain transactions with MEC, pending the outcome of this matter, that could not be unwound. These are our reasons for dismissing the Applications.

II. THE PARTICIPANTS

A. The Applicants

1. Farallon Capital Management, L.L.C. et al.

[15] The Shareholders are a group of U.S.-based investment management firms including hedge fund sponsors and mutual fund managers catering to a variety of institutional and retail clients.

[16] As of July 10, 2009, the Shareholders collectively owned or controlled approximately 37% of the outstanding Class A subordinate voting shares of MID ("**MID Class A Shares**").

2. Greenlight Capital, Inc.

[17] Greenlight is a New York-based investment management firm founded in 1996. Together with its affiliates, Greenlight manages approximately US$5 billion in assets.

[18] Greenlight has had a significant investment in MID since MID was spun out from Magna International Inc. ("**Magna**") in 2003. Greenlight, together with its affiliates, owns 5.6 million MID Class A Shares, representing approximately 12% of the outstanding MID Class A Shares. Greenlight also holds US$1,000,000 principal amount of MEC 8.55% convertible subordinated notes due June 15, 2010.

B. MI Developments Inc.

[19] MID is a company incorporated under the laws of Ontario. In August 2003, Magna spun-off MID as a public company and the owner of Magna's real estate assets. MID is a real estate operating company engaged principally in the ownership, management, leasing, development and acquisition of industrial and commercial real estate properties. Its head office is located in Aurora, Ontario.

[20] As part of the spin-off, Magna transferred to MID all of its shares in MEC. As of September 1, 2009, MID held a 54% equity interest and a 96% voting interest in MEC through the ownership of 218,116 MEC Class A subordinate voting shares ("**MEC Class A Shares**") and 2,928,447 MEC Class B shares ("**MEC Class B Shares**").

[21] The authorized capital of MID consists of an unlimited number of MID Class A Shares, 706,170 MID Class B shares ("**MID Class B Shares**"), and an unlimited number of preference shares issuable in series. As of September 3, 2009, MID had 46,160,564 MID Class A Shares, 547,413 MID Class B Shares, and no preference shares outstanding. Each MID Class A Share carries one vote and each MID Class B Share carries 500 votes.

[22] The MID Class A Shares are listed on the Toronto Stock Exchange (the "**TSX**") and the New York Stock Exchange. The MID Class B Shares are listed on the TSX.

[23] MID is controlled by a group of persons consisting of Mr. Frank Stronach, the Stronach Trust, 445327 Ontario Limited ("**445327**") and Fair Enterprise. Those persons are collectively referred to in these reasons as the "**Stronach Group**".

[24] Mr. Stronach is a director and the Chairman and founder of each of MID and MEC. Until April 7, 2009, Mr. Stronach was also the Chief Executive Officer of MEC. Mr. Stronach and three other members of his family are trustees of the Stronach Trust and Mr. Stronach is also a potential beneficiary; 445327 is wholly-owned by the Stronach Trust.

[25] MID is controlled by the Stronach Group and is a control person with respect to MEC within the meaning of MI 61-101.

C. The Intervenors

1. Magna Entertainment Corp.

[26] MEC is a public company incorporated under the laws of the State of Delaware with a registered office in Wilmington, Delaware and its principal executive office in Aurora, Ontario. MEC is the owner and operator of horse racetracks in North America and one of the world's leading suppliers of live horse racing content to the inter-track, off-track and account wagering markets. MEC was created in 1999 as part of a reorganization of the non-automotive businesses of Magna, under which Magna transferred certain horse racing and real estate assets to MEC. Magna spun off a minority interest in MEC to Magna shareholders in March, 2000 when MEC became a public company.

[27] The authorized capital of MEC consists of 310,000,000 Class A subordinate voting shares ("**MEC Class A Shares**") and 90,000,000 Class B shares ("**MEC Class B Shares**"). Each MEC Class A Share carries one vote and each MEC Class B Share carries 20 votes. Prior to March 2009, the MEC Class A Shares were listed on the TSX and the NASDAQ National Market ("**NASDAQ**"). The shares were de-listed from the TSX effective April 1, 2009 and from the NASDAQ effective March 16, 2009, as a result of the bankruptcy of MEC.

[28] MEC is controlled by the Stronach Group through MID. MID beneficially owns 218,116 MEC Class A Shares and 2,928,447 MEC Class B Shares, representing in aggregate 54% of MEC's outstanding equity securities and 96% of the votes attached to MEC's outstanding voting securities.

[29] In March 2009, MEC initiated voluntary bankruptcy proceedings by making the Bankruptcy Filings in the United States Bankruptcy Court for the District of Delaware (the "**U.S. Bankruptcy Court**") and by commencing a parallel proceeding in Canada under the *Companies' Creditors Arrangement Act*.

2. Fair Enterprise Limited

[30] Fair Enterprise is a company incorporated under the laws of the Island of Jersey, Channel Islands. It is an estate planning vehicle for the Stronach family. The members of the Stronach family are indirect beneficiaries. All of the shares of Fair Enterprise are held by Bergenie Anstalt, a Lichtenstein anstalt. The directors of Fair Enterprise are EFG Corporate Services Limited and EFG Trust Company Limited and are not otherwise related to Mr. Stronach or any other member of the Stronach Group.

[31] Prior to November 25, 2008, Fair Enterprise owned 628,570 MEC Class A Shares (the "**Fair Enterprise MEC Shares**") representing approximately 21.5% of the outstanding MEC Class A Shares and less than 1% of the votes attached to MEC's outstanding voting securities.

[32] As noted above, Fair Enterprise is part of the Stronach Group and there is no dispute that Fair Enterprise is a related party of MID within the meaning of MI 61-101.

[33] Mr. Stronach is not a director or shareholder of Fair Enterprise. According to Fair Enterprise, Mr. Stronach shared control and direction over the Fair Enterprise MEC Shares until November 25, 2008.

III. THE RELEVANT TRANSACTIONS

[34] The focus of the Applications are the November Transactions and the March Transactions. The Applicants allege that these transactions violated MI 61-101 for the following reasons:

(i) In each case, the relevant transactions were "related party transactions" between MID and MEC within the meaning of MI 61-101;

(ii) Minority Approval of the related party transactions and a formal valuation were required under MI 61-101 and were not obtained and no exemption was available;

(iii) The downstream transaction exception contained in paragraph (g) of section 5.1 of MI 61-101 (the "**Downstream Exception**") was not available to MID in respect of the November Transactions or the March Transactions because, at the relevant time, Fair Enterprise beneficially owned or exercised control or direction over more than 5% of a class of equity or voting securities of MEC through its interest in the Fair Enterprise MEC Shares. The Downstream Exception was not, or should not be, available to MID because:

a. The Azalea Trust Transaction (described further under "The Azalea Trust Transaction," below) under which Fair Enterprise purported to dispose of the Fair Enterprise MEC Shares was not completed at the time that the November Transactions were agreed to by MID and MEC;

b. MID failed to make reasonable inquiry that no related party of MID beneficially owned or exercised control or direction over more than 5% of a class of equity or voting securities of MEC;

c. The Azalea Trust Transaction was an artificial transaction and a sham and did not effect a disposition by Fair Enterprise of the beneficial ownership of the Fair Enterprise MEC Shares;

d. The Azalea Trust Transaction was carried out on the basis of improperly acquired information about the pending November Reorganization Proposal and in violation of insider tipping and trading prohibitions, and trading blackout requirements, and such violations should prevent MID from relying on the Downstream Exception in the circumstances; and

(iv) The 25% market capitalization exemption contained in paragraph (a) of section 5.5 of MI 61-101 (the "**Market Cap Exemption**") was not available to MID in respect of the November Transactions or the March Transactions because each group of transactions was part of a series of "connected transactions", the fair market value of which, when aggregated, exceeded 25% of the market capitalization of MID at the relevant time (determined in accordance with MI 61-101).

A. The November Transactions

[35] The November Transactions involved a multi-stage transaction that included MID providing a new loan to MEC of up to US$125 million (i.e., the November Loan) and MID extending the maturity and repayment dates of amounts due under MID's existing US$312 million secured loans to MEC (i.e., the Loan Extension), which amounts would otherwise have become due on December 1, 2008.

[36] The November Transactions also included the November Reorganization Proposal which was to be implemented following MID shareholder approval, including Minority Approval by the holders of MID Class A Shares, and which included:

(i) A substantial issuer bid by MID;

(ii) The purchase by MID from MEC of selected real estate assets at fair market value;

(iii) The purchase by the Stronach Group from MID of MEC shares; and

(iv) MID acquiring up to a 60% voting interest in MEC.

If completed, the November Reorganization Proposal would have spun out MID's interest in MEC to the MID shareholders.

[37] MID represented that the purpose of the November Loan was two-fold. First, it was meant to provide immediate funding so that MEC could continue its operations until MID shareholders had an opportunity to consider and vote on the November Reorganization Proposal. Second, US$28.5 million was made available for the limited purpose of funding an application by MEC in connection with a lottery licence. That application was ultimately unsuccessful and US$27.5 million was repaid to MID. The November Loan was advanced under an agreement dated December 1, 2008.

[38] The Loan Extension extended the maturity dates of existing secured loans from MID to MEC in the aggregate amount of US$312 million. The extension was for a period of four months, from December 1, 2008 to March 31, 2009. The Loan Extension was a unilateral extension by MID as permitted under terms of the loans that expressly provide that MID may unilaterally extend the maturity and repayment dates of the loans.

[39] If the November Reorganization Proposal did not receive the requisite MID shareholder approval, or was abandoned or withdrawn, the maturity dates and repayment dates under the November Loan and the Loan Extension would be accelerated to a date 30 days after the abandonment or withdrawal of the November Reorganization Proposal.

[40] On February 18, 2009, MID publicly announced that it was not proceeding with the November Reorganization Proposal. As a result, the maturity dates and repayment dates of the November Loan and the Loan Extension were accelerated to March 20, 2009.

[41] In the early hours of November 26, 2008, before the special committee of disinterested directors of MID and the MID board of directors met to approve the November Transactions, counsel for MID sent an e-mail to counsel for Fair Enterprise which stated that:

> In order to rely on the downstream transaction [sic], MID needs to make reasonable enquiry that no related party owns more than 5% of any class of MEC shares. Would you confirm that Frank Stronach and related entities no longer beneficially own or exercise control or direction over, other than through their interest in MID, any shares of MEC (or at a minimum no more than 5% of any class of MEC shares).

At approximately 6:15 a.m. on November 26, counsel for Fair Enterprise replied that "I did ask the question previously and was advised that neither Frank [Stronach] nor any other related entity to Frank [Stronach] owned or exercised control or direction over any MEC Shares (other than indirectly though MID)". A few minutes later, counsel for Azalea Trust confirmed that this was his understanding as well.

B. The Azalea Trust Transaction

[42] On November 25, 2008, Fair Enterprise purported to sell the Fair Enterprise MEC Shares to the Azalea 2008 Trust (the "**Azalea Trust**"). That sale transaction is referred to in these reasons as the "**Azalea Trust Transaction**". The news release relating to the Azalea Trust Transaction provided as follows:

> THE AZALEA 2008 TRUST ACQUIRES SHARES OF MAGNA ENTERTAINMENT CORP.
>
> November 25, 2008 – The Azalea 2008 Trust has acquired, by private agreement, ownership and control over 628,570 shares of Class A Subordinate Voting Stock (the "Class A Shares") of Magna Entertainment Corp. ("MEC"), representing approximately 21.6% of the outstanding Class A Shares of MEC. The Trust intends to sell the Class A Shares of MEC as soon as practicable and in an orderly fashion when permitted to do so under applicable securities laws, and intends on donating any net gains (after expenses) resulting from the sale of such shares to one or more registered Canadian charities designated by the trustee of the Trust.
>
> For further information, please contact:
> Timothy Jones
> c/o 40 King Street West
> Suite 5800
> Toronto, Ontario
> M5H 3S1

[43] The November Transactions were publicly announced the next day, November 26, 2008.

[44] The Azalea Trust was established on November 25, 2008 by Mr. Timothy Jones as settlor. Mr. Jones also served as the sole director and officer of the numbered company incorporated on the same day to act as trustee of the Azalea Trust. Mr. Jones is a former mayor of Aurora, Ontario and is a paid consultant to Neighbourhood Network, a community initiative founded by Belinda Stronach, Executive Vice-Chairman and a director of Magna.

[45] The purpose of Azalea Trust, as set out in its organizing trust deed, is to benefit one or more Canadian registered charities. The beneficiaries of Azalea Trust are such Canadian registered charities as are appointed by the trustee, and if no such charities are appointed, then the beneficiary is the Reena Foundation, a charity for people with developmental disabilities. The sole trustee of Azalea Trust is 2191273 Ontario Inc. ("**2191273**"), a corporation wholly-owned by Mr. Jones. Mr. Jones is the sole director and officer of 2191273. Under section 8.3 of the trust deed for the Azalea Trust, 2191273 is entitled to trustee fees equal to 10% of the net proceeds of sale of the Azalea Trust's MEC shares to a maximum of $100,000.

[46] The purchase price of the Fair Enterprise MEC Shares was US$886,284.00, which we are told represented the fair market value of the shares determined at the time of the Azalea Trust Transaction. Azalea Trust satisfied the purchase price by issuing to Fair Enterprise a non-interest bearing promissory note due December 31, 2010 (the "**Promissory Note**"). Recourse against Azalea Trust under the Promissory Note was limited to "the enforcement and realization by the Holder of its legal and equitable rights and remedies against the MEC Shares and the proceeds realized from the sale of the MEC Shares." These terms of the Azalea Trust Transaction were not disclosed in the news release issued by Fair Enterprise on November 25, 2008 (referred to in paragraph 42 of these reasons).

[47] It was represented to us that Mr. Stronach caused the sale of the Fair Enterprise MEC Shares for two reasons. First, Mr. Stronach wanted to address allegations from certain MID shareholders that his economic interests were not aligned with MID and its shareholders because he had a direct interest in MEC through the ownership by Fair Enterprise of the Fair Enterprise MEC Shares. Second, Mr. Stronach was generally aware that if Fair Enterprise disposed of those shares, an exemption from the related party transaction requirements of MI 61-101 would be available to MID (i.e., the Downstream Exception would be available).

[48] At the closing of the Azalea Trust Transaction, the share certificates for the Fair Enterprise MEC Shares were not endorsed and delivered to the Azalea Trust. Rather, a transfer form was signed and delivered. The Fair Enterprise MEC Shares were not registered in the name of the Azalea Trust until April 13, 2009, and the certificates for those shares were not delivered to the Azalea Trust until April 17, 2009.

[49] Pursuant to a covenant in the purchase agreement related to the Azalea Trust Transaction, the Azalea Trust agreed to "sell the MEC Class A Shares that it purchased as soon as practicable after November 25, 2008 and in an orderly fashion when permitted to do so under applicable securities laws" (the "**Disposition Covenant**") and was to apply the net proceeds of sale to the repayment of the Promissory Note. Any excess of the net proceeds over the amounts due under the Promissory Note was to be donated to charity.

[50] The legal counsel who acted for Azalea Trust in connection with the Azalea Trust Transaction testified that Azalea Trust had technical difficulties in attempting to sell the Fair Enterprise MEC Shares and to comply with the Disposition Covenant. These difficulties included the following:

(i) Mr. Jones originally understood that a hold period applied to the Fair Enterprise MEC Shares and, accordingly, did not take steps to immediately sell those shares;

(ii) approximately 71% of the Fair Enterprise MEC Shares were represented by a share certificate containing a legend restricting trading under applicable U.S. securities law and requiring the Azalea Trust to obtain a legal opinion that any proposed sale was in fact exempt from, or not subject to, registration requirements under U.S. securities law;

(iii) the MEC Class A Shares were delisted from NASDAQ on March 16, 2009;

(iv) the trading of MEC Class A Shares on the TSX was suspended on March 6, 2009 and the MEC Class A Shares were delisted on April 1, 2009;

(v) there were problems obtaining MEC's consent to effecting the legal transfer of the Fair Enterprise MEC Shares to the Azalea Trust due to complications that arose from MEC's bankruptcy; and

(vi) there was some confusion surrounding transferring the Fair Enterprise MEC Shares through MEC's transfer agent relating to how the relevant guarantee medallion program was to be complied with.

The last of these difficulties was not finally resolved until May 1, 2009.

[51] The Applicants alleged that Azalea Trust was in breach of the Disposition Covenant by the time of the March Transactions.

[52] The Azalea Trust filed a Schedule 13D with the United States Securities and Exchange Commission (the "**13D**") on December 5, 2008. The 13D disclosed that the Azalea Trust owned the Fair Enterprise MEC Shares and that the trustee of the Azalea Trust and Mr. Jones, as sole director and officer of the trustee, may be deemed beneficial owners of those shares for .S. securities law purposes.

[53] On March 27, 2009, Fair Enterprise released the Azalea Trust from its obligations under the Promissory Note, and each of Fair Enterprise and the Azalea Trust mutually released each other from all claims arising in connection with the Azalea Trust Transaction.

[54] On June 29, 2009, the Azalea Trust sold the Fair Enterprise MEC Shares for an aggregate price of $7,500 to 2210456 Ontario Inc., a company that was owned and controlled by a third party.

[55] MID represented that it was not directly involved in negotiating, documenting, structuring or implementing the Azalea Trust Transaction. MID says that it had no specific knowledge of the terms of that transaction other than as a result of the inquiries described in paragraph 157 of these reasons.

C. The DIP Financing and Stalking Horse Bid

[56] On March 5, 2009, MEC and certain of its subsidiaries made the Bankruptcy Filings and on the same day were granted recognition by the Ontario Superior Court of Justice of the U.S. bankruptcy proceedings under the *Companies' Creditors Arrangement Act*.

[57] The DIP Financing and Stalking Horse Bid were publicly announced on March 5, 2009. MID agreed to lend MEC an amount of up to US$62.5 million under the DIP Financing. The aggregate purchase price offered by MID for the purchase from MEC of assets under the Stalking Horse Bid was US$195 million. That purchase price was to be satisfied (i) as to US$136 million, through a credit for MID's existing loans to MEC, (ii) as to US$44 million, by payment in cash, and (iii) as to US$15 million, through the assumption of a capital lease. The Stalking Horse Bid represented the minimum offer or "floor price" for the MEC assets. Third parties were encouraged to make higher competing offers.

[58] On April 20, 2009, MID publicly announced that it had agreed with MEC to terminate the Stalking Horse Bid in response to objections raised by a number of parties in the MEC bankruptcy proceeding. As a result, no assets were purchased by MID under the Stalking Horse Bid.

[59] On April 20, 2009, MID also publicly announced that the terms of the DIP Financing had been amended to, among other things, extend the maturity date from September 6, 2009 to November 6, 2009 and to reduce the principal amount from US$62.5 million to US$38.4 million.

D. The Amended DIP Financing

[60] On August 26, 2009, MID publicly announced that the terms of the DIP Financing had been conditionally amended to, among other things, increase the principal amount of the loan by US$28 million to up to US$66.4 million, and to extend the maturity date to April 30, 2010 (the "**Amended DIP Financing**"). The Amended DIP Financing is conditional upon the Commission rendering a decision in favour of MID in connection with the Applications and upon the U.S. Bankruptcy Court approving the amendment.

[61] Under the Amended DIP Financing, MEC must use its best efforts to sell all its assets by seeking "stalking horse" bidders and conducting auctions of its assets. Any sales are subject to approval by the U.S. Bankruptcy Court. MID has indicated that it does not intend to bid on certain of MEC's assets; it has also indicated that it is continuing to evaluate whether to make offers to purchase one or more of the other assets of MEC, in the event that MEC receives no other bids acceptable to MEC.

[62] No advances under the Amended DIP Financing were to be made prior to October 1, 2009.

IV. THE HEARING

[63] The hearing on the merits to consider the Applications was held on September 9 and 10, 2009. Two witnesses were called to testify: they were Mr. Richard J. Crofts, Executive Vice-President, Corporate Development, General Counsel and Secretary of MID, and Mr. John M. Campbell, a lawyer with Miller Thomson and the legal counsel who acted for the Stronach Group, Fair Enterprise and the Azalea Trust in connection with the Azalea Trust Transaction.

V. THE ISSUES

A. The Questions for Determination

[64] The Applications raised the following questions for determination:

(i) Can the Commission make the order requested by the Applicants under section 104 of the Act?

(ii) Can the Applicants bring the Applications under section 127 of the Act?

(iii) If so, can the Commission make the order requested by the Applicants under section 127 of the Act?

(iv) Was an exemption from the requirement for Minority Approval and the requirement to prepare a formal valuation available to MID in respect of the November Transactions, the March Transactions and the Amended DIP Financing?

(v) Were there insider trading violations in connection with the Azalea Trust Transaction, and if so, did such violations prevent MID from relying on exemptions under MI 61-101?

B. Can the Commission Make the Order Requested under Section 104 of the Act?

1. Submissions

The Applicants

[65] The Applicants submitted that section 104 of the Act applies by its terms to a requirement of Part XX of the Act or to "the regulations related to" that Part. Under subsection 1(1) of the Act "'regulations' means the regulations made under this Act and, unless the context otherwise indicates, includes the rules". The Applicants submitted that MID has not complied with MI 61-101, which is a rule of the Commission.

[66] The Applicants say that MI 61-101 deals with issuer bids, insider bids, business combinations and related party transactions. They submitted that take-over bids and issuer bids are regulated under Part XX of the Act. They also say that related party transactions are included in MI 61-101 because they raise similar regulatory concerns as issuer bids and insider bids.

[67] Accordingly, the Applicants submitted that the Commission has the authority under section 104 of the Act to make an order on the terms requested by the Applicants.

MID

[68] MID submitted that the Applicants cannot bring an application under section 104 of the Act in the circumstances because Part XX of the Act relates to take-over bids and issuer bids, and does not apply to related party transactions.

[69] In support of its position, MID pointed out that the terms "take-over bid" and "issuer bid" are referred to in a number of the possible orders that can be issued under subsection 104(1) of the Act. MID also notes that the exemptive relief power available under subsection 104(2)(a) of the Act relates specifically to take-over bids and issuer bids by reason of the reference to section 97.1 of the Act. MID pointed out that Part XX of the Act is entitled "Take-over Bids and Issuer Bids". MID also says that according to the National Numbering System adopted by the Canadian Securities Administrators, rules related exclusively to take-over bids are prefaced with "6.2", whereas "6.1" (as in MI 61-101) relates to "special transactions" (CSA Staff Notice 11-312 – *National Numbering System* (2009), 32 O.S.C.B. 1211 at 1213).

[70] MID submitted that the Commission's *Rules of Procedure* (*The Rules of Procedure of the Ontario Securities Commission* (2009), 32 O.S.C.B. 1991 (the "Rules of Procedure")), which came into force April 1, 2009, confirm that applications brought pursuant to section 104 are confined to applications brought "in connection with take-over bids, issuer bids and mergers and acquisitions transactions" and not related party transactions. The Rules of Procedure provide, in part, as follows:

> "*1.1 Interpretation* – In these Rules:
>
> [. . .]
>
> 'application' includes an application:
>
> […]
>
> (f) pursuant to section 104 and/or section 127 of the Act *in connection with take-over bids, issuer bids and mergers and acquisitions transactions*;
>
> [. . .]
>
> *2.4 Application pursuant to Section 104 and/or Section 127 of the Act* – (1) An application made pursuant to section 104 of the Act in connection with *a take-over bid or an issuer bid* by an interested person as defined in subsection 89(1) of the Act, or an application pursuant to section 127 of the Act in connection with *a take-over bid or an issuer bid*, shall be made in accordance with Rule 16, with any modifications as the circumstances require.
>
> [. . .]
>
> *Rule 16 -- Application pursuant to Section 104 and/or Section 127 of the Act*
>
> *16.1 Application* – (1) An application made pursuant to section 104 of the Act *in connection with a take-over bid or an issuer bid* by an interested person as defined in subsection 89(1) of the Act, or an application made pursuant to section 127 of the Act *in connection with a take-over bid or an*

> *issuer bid*, shall be made by serving it on every other party and *on the Manager of Take-Over Bids, Issuer Bids and Mergers and Acquisitions Transactions* and filing it" [emphasis added].

Staff

[71] Staff submitted that the Commission should apply a contextual approach to the interpretation of the Act. Staff submitted that the ordinary meaning of the words "related to" implies a broad association, and therefore the connection between Part XX and MI 61-101 should be interpreted as broad rather than narrow.

[72] Staff submitted that both Part XX of the Act and MI 61-101 overlap and regulate the same types of transactions. MI 61-101 was designed, in part, to afford additional protections for minority shareholders in connection with insider bids (a type of take-over bid) and issuer bids, the very types of transactions also regulated under Part XX of the Act. Accordingly, Staff submitted that MI 61-101 is related to Part XX and that, as a result, section 104 applies to related party transactions because such transactions are subject to MI 61-101.

[73] Staff further submitted that the Commission has recognised that the additional protections under MI 61-101 for minority shareholders in connection with insider bids and issuer bids are also necessary in respect of business combinations and related party transactions. In this way, the types of transactions regulated by Part XX and MI 61-101 – insider bids, issuer bids, business combinations and related party transactions – are a related category of transactions that raise common policy concerns. Indeed, it is for this reason that MI 61-101 was enacted.

[74] Staff submitted that the predecessor to MI 61-101 (Commission Policy 3-37) was initially limited to regulating the disclosure requirements related only to issuer bids, but the policy was gradually and iteratively expanded over time to regulate and encompass additional types of transactions that raise similar policy concerns. First, it was extended to encompass insider bids and business combinations, and finally, to regulate related party transactions.

[75] Staff submitted that the relationship between Part XX and MI 61-101 is reflected in the rule-making provisions of the Act. Paragraph 28 of subsection 143(1) groups related party transactions in the same provision as take-over bids, issuer bids and insider bids for purposes of the Commission's rule-making authority. Further, the particular subparagraph under which MI 61-101 was enacted (subparagraph 143(1)28(vii)), specifically authorizes the Commission to prescribe requirements in respect of issuer bids, insider bids, going private transactions and related party transactions for "disclosure, valuations, review by independent committees of boards of directors and approval by minority security holders," presumably as a result of the Commission's historical concerns arising from these types of transactions.

2. Analysis and Conclusion

[76] Section 104 of the Act provides, in part, as follows:

> 1**04. (1) Application to the Commission** – On application by an interested person, if the Commission considers that a person or company has not complied with, or is not complying with, a requirement under this Part *or the regulations related to this Part*, the Commission may make an order… [emphasis added].

[77] The question we must determine is whether section 104 of the Act applies to related party transactions. It will apply to related party transactions if the provisions of MI 61-101 applicable to related party transactions are regulations "related to" Part XX of the Act. We agree with Staff that we should apply a purposive approach to the interpretation of the Act and, in doing so, we should consider the regulatory objectives of the Act. As stated in *Bell ExpressVu*, the proper approach to interpretation is as follows:

> In Elmer Driedger's definitive formulation, found at p. 87 of his *Construction of Statutes* (2nd ed. 1983):
>
> > Today there is only one principle or approach, namely, the words of an Act are to be read in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament.
>
> Driedger's modern approach has been repeatedly cited by this Court as the preferred approach to statutory interpretation across a wide range of interpretive settings: [citations omitted] …
>
> *Bell ExpressVu Limited Partnership v. Rex*, [2002] S.C.J. No. 43 ("***Bell Express Vu***") at para. 26.

[78] We note that the question we must address is not whether the Commission has authority to implement rules related to related party transactions. The Commission clearly has that authority and has exercised it in implementing the provisions of MI

61-101 as they relate to related party transactions. Nor, in our view, is the question whether related party transactions raise some of the same or similar regulatory concerns as those raised by insider bids and issuer bids. They clearly do raise similar concerns and that is why related party transactions are included in MI 61-101. We note, however, that MI 61-101 imposes the requirement for Minority Approval only in connection with related party transactions and business combinations and not insider bids or issuer bids.

[79] We do not think that references in the Commission's rule-making authority, the Rules of Procedure or the numbering system for regulatory instruments are particularly helpful in determining the application of a power such as that contained in section 104 which is conferred by the Act.

[80] Section 104 grants very broad statutory authority to the Commission to intervene in and regulate transactions that are subject to it. Among other powers under that section, the Commission may order persons to comply with a requirement of Part XX or to restrain them from breaching a requirement of Part XX. The Commission does not have similar general authority to make compliance or restraining orders under any other provision of the Act.

[81] Part XX of the Act relates to take-over bids and issuer bids, including the early warning requirements. Nowhere does Part XX refer to or regulate related party transactions. Section 104 gives the Commission authority to intervene pursuant to regulations "related to" Part XX. There is no question that portions of MI 61-101 relate to take-over bids and issuer bids. We also agree that the words "related to" should be given a broad interpretation, but the relevant subject matter of MI 61-101 must nonetheless have a sufficient nexus to Part XX of the Act.

[82] In our view, the Commission cannot expand its jurisdiction and authority under section 104 of the Act by including provisions regulating other types of transactions in a rule that also applies to take-over bids and issuer bids. There is nothing wrong, of course, in addressing different types of transactions in one rule, but in our view, doing so cannot expand the application of section 104.

[83] Section 104 provides extraordinary authority to the Commission to intervene in and regulate take-over bids and issuer bids and the other matters governed by Part XX of the Act. If it was intended that this authority also apply to other types of transactions, such as related party transactions, the Act would have done so expressly.

[84] In our view, the provisions of MI 61-101 applicable to related party transactions are not related to Part XX of the Act. This proceeding does not relate to a take-over bid or an issuer bid, but rather to a series of related party transactions. Accordingly, in our view, the Commission does not have authority to make an order under section 104 of the Act restraining MID from entering into future related party transactions.

[85] Accordingly, we dismissed the Applications to the extent that they were brought under section 104 of the Act.

[86] We would add that there is no doubt that our public interest jurisdiction under section 127 of the Act applies to related party transactions and the other types of transactions that are subject to MI 61-101.

C. Can the Applicants bring the Applications under Section 127 of the Act?

1. Submissions

The Applicants

[87] The Applicants submitted that they can properly bring the Applications under section 127 of the Act. The Applicants say that section 127 does not limit by its terms the right of private parties to bring an application under section 127. Accordingly, in their view, the Commission should not limit the availability of section 127.

[88] The Applicants submitted that the *Rules of Procedure* contemplate that an application may be brought under sections 104 and 127 of the Act by an applicant other than Staff. Rule 1.1 defines an "application" as follows: "'application' includes an application: (a) by Staff pursuant to section 127 of the Act; … (f) pursuant to section 104 and/or section 127 of the Act in connection with take-over bids, issuer bids and mergers and acquisitions transactions…"

[89] The Applicants submitted that there are other rules that contemplate the jurisdiction of a private party to bring an application, including sections 2.4 and 16.1(1) of the *Rules of Procedure*, which specify the manner in which certain applications pursuant to sections 104 and 127 of the Act are to be initiated by persons other than Staff.

[90] The Applicants further submitted that subsection 127(4) of the Act provides that "[n]o order shall be made under this section without a hearing, subject to section 4 of the *Statutory Powers Procedure Act*". The exceptions under the *Statutory Powers Procedures Act* ("**SPPA**") to when a hearing is required are dealt with in section 4.5 and section 4.6 of the SPPA. Each of these provisions requires that notice be given of an intention to deny the right to a hearing. In particular, section 4.5 of the

SPPA deals with technical defects in the documents relating to the commencement of a proceeding, and subsection 4.5(2) of the SPPA requires notice to be given to the "party who commences a proceeding" if the tribunal or administrative staff intend to invoke that provision. Section 4.6 of the SPPA deals with the dismissal of a proceeding without a hearing on the basis that it is frivolous, vexatious, is commenced in bad faith, there is a lack of jurisdiction, or it is considered that some aspect of the statutory requirements for bringing a hearing have not been met. If the Commission (not Staff) intends to dismiss an application based on section 4.6 of the SPPA, there is a requirement under subsection 4.6(2) to give notice to the party who commences the proceeding and, under subsection 4.6(3), to provide an opportunity for such party to make written submissions in response.

[91] The Applicants submitted that these provisions of the SPPA therefore suggest that a person other than Staff may apply for relief under section 127. The Applicants also submitted that this interpretation is consistent with the purposes of the Act set out in section 1.1 to (a) provide protection to investors from unfair, improper or fraudulent practices, and (b) foster fair and efficient capital markets and confidence in the capital markets.

[92] The Applicants also submitted that there have been cases where private parties have brought applications under section 127 of the Act such as in connection with applications to cease trade a poison pill. Those applications are usually also brought simultaneously under section 104 of the Act.

MID

[93] MID submitted that private parties cannot bring an application under section 127 in a case such as this, which does not involve a take-over bid or issuer bid. MID concedes that applications can be brought under section 104 by private parties in connection with take-over bids or issuer bids, but the Applications do not relate to take-over bids or issuer bids.

[94] MID submitted that public policy is against allowing private parties to use section 127 of the Act for private purposes. The authority granted under section 127 is in the nature of an enforcement power that should be available only in proceedings initiated by Staff.

Staff

[95] Staff submitted that, while rare, there may be limited circumstances that would warrant permitting a private party to make an application under section 127. Staff submitted that, in order for a private party to be entitled to initiate a section 127 proceeding (i) the matter at issue must be in relation to an imminent or unfolding transaction that falls within the policy framework of securities regulation, (ii) the applicant must be a proper party with a direct interest in the outcome of the matter, and (iii) the Commission must conclude that it is a proper forum in which to both hear the application and to grant a remedy. Staff submitted that section 127 proceedings brought in those circumstances are not enforcement proceedings.

[96] Staff also submitted that the circumstances where a private party should be able to bring an application under section 127 of the Act were properly articulated in *Cablecasting*, where the Commission stated that:

> [t]he Commission acknowledged that it has jurisdiction to exercise its section 144 authority [the predecessor to section 127] on application by a minority shareholder, but stressed that its willingness to hear this specific application was premised on the statement alluded to above, made by Mr. Salter as Director of the Commission, that the application was of urgency and had sufficient merit to justify consideration by the Commission. This is, in the view of the Commission, the appropriate procedure by which matters and requests such as this should come before it.
>
> *Re Cablecasting Ltd.* (1978), O.S.C.B. 37 ("***Cablecasting***") at page 40.

[97] In Staff's submission, matters of "urgency" would suggest that a "live" or unfolding transaction is required. If a matter involves past conduct alone, Staff submitted that it would be difficult to imagine a situation where the remedy sought would be urgent. Allowing private parties unfettered access to the Commission under section 127 would, in Staff's submission, be tantamount to permitting private enforcement of the Act. Staff submitted that there must be some compelling reason why the Commission should grant access to a private party under section 127 and, in Staff's submission, that requires an unfolding transaction that raises issues of public interest or alleged breach of the Act or regulations.

[98] Staff submitted that the only imminent or unfolding transaction raised in the Applications that may invoke the public interest mandate of the Commission under section 127 is the Amended DIP Financing.

2. Analysis and Conclusion

[99] Section 127 of the Act sets forth the types of public interest orders that may be made by the Commission. That public interest power is most often applied to regulatory and enforcement matters and applications for that purpose are usually brought by Staff.

[100] Unlike section 104 of the Act, section 127 does not expressly provide that an application can be brought by an "interested person". Rule 2.1 of the *Rules of Procedure* contemplates that applications under section 127 are to be commenced by Staff by issuing a statement of allegations.

[101] At the same time, applications by persons other than Staff have been permitted by the Commission under section 127, in some circumstances, where the applicants wished to obtain one of the types of orders available under that section, usually a cease trade order or an order to remove exemptions in respect of a particular transaction. That has been the case, for example, in poison pill hearings held by the Commission. Rule 2.4 of the *Rules of Procedure* contemplates that an application pursuant to section 127 may be made by a person other than Staff *in connection with a take-over bid or issuer bid*. That suggests that persons other than Staff can bring an application under section 127 in those circumstances.

[102] It is not completely clear to us what the reference in subsection 127(4) of the Act to section 4 of the SPPA is intended to import. The Applicants submitted that reference is to sections 4.5 and 4.6 of the SPPA which thus suggests that third parties may bring an application under section 127. One can argue, however, that at least certain paragraphs of sections 4.5 and 4.6 apply equally to an application brought by Staff under section 127, such as where there is a technical defect in the commencement of the proceeding, the proceeding is outside the jurisdiction of the Commission or some other statutory requirement has not been met. The general reference to section 4 of the SPPA also includes section 4.1 of the SPPA which provides that parties may consent to a decision of a tribunal without a hearing, a circumstance that may arise in a proceeding brought by Staff.

[103] Accordingly, in our view, the provisions of the SPPA do not assist us in coming to a conclusion whether persons other than Staff can bring an application under subsection 127 as a matter of right.

[104] The Supreme Court of Canada discussed the nature of the Commission's public interest jurisdiction under section 127 of the Act in *Committee for the Equal Treatment of Asbestos Minority Shareholders v. Ontario (Securities Commission)*, [2001] 2 S.C.R. 132 ("***Asbestos***"). We will not repeat all of that discussion. In summary, the Court indicated that the Commission's public interest jurisdiction provides a broad regulatory authority but one that is not unlimited. Its exercise must be animated by the purposes of the Act. The purpose of the public interest jurisdiction is neither remedial nor punitive. Rather, its purpose is to restrain future conduct that is likely to be prejudicial to investors or the public interest in fair and efficient capital markets.

[105] The Supreme Court of Canada stated in *Asbestos* that:

> In summary, pursuant to s. 127(1), the OSC has the jurisdiction and a broad discretion to intervene in Ontario capital markets if it is in the public interest to do so. However, *the discretion to act in the public interest is not unlimited*. In exercising its discretion, the OSC should consider the protection of investors and the efficiency of, and public confidence in, capital markets generally. *In addition, s. 127(1) is a regulatory provision. The sanctions under the section are preventive in nature and prospective in orientation. Therefore, s. 127 cannot be used merely to remedy Securities Act misconduct alleged to have caused harm or damages to private parties or individuals* [emphasis added].
>
> *Asbestos*, *supra* at para. 45.

[106] The Commission is also entitled to consider both specific and general deterrence in exercising its public interest jurisdiction. The Supreme Court of Canada confirmed in *Cartaway* that "it is reasonable to view general deterrence as an appropriate, and perhaps necessary, consideration in making orders that are both protective and preventative" (*Re Cartaway Resources Corp.*, [2004] 1 S.C.R. 672 ("***Cartaway***") at para. 60).

[107] In our view, persons other than Staff are not entitled as of right to bring an application under section 127 where the application is, at its core, for the purpose of imposing sanctions in respect of past breaches of the Act or past conduct alleged to be contrary to the public interest. In our view, those purposes are regulatory in nature and enforcement related and such applications should be able to be brought as of right only by Staff. Section 127 should not be used merely to remedy misconduct alleged to have caused harm or damage to private persons.

[108] In our view, however, the Commission has discretion to permit an application to be brought by persons other than Staff under section 127. The question then, is in what circumstances the Commission should exercise that discretion?

[109] The Applications are not, at their core, brought merely for the purpose of imposing sanctions for past breaches of the Act or past misconduct. While the past conduct of MID is a central focus of the Applications, the order sought is future looking and prophylactic and not in the nature of simply an enforcement sanction. Rather, the Applications are brought for the purpose of preventing MID from completing the Amended DIP Financing and from entering into other future related party transactions with MEC, without obtaining Minority Approval. We note in this respect that MID has indicated that it may consider entering into future related party transactions with MEC in connection with the possible purchase of assets of MEC.

[110] We believe that the Applicants should be permitted to bring the Applications under section 127 for the following reasons:

(i) the Applications involve or relate to past and possible future related party transactions between MID and MEC, transactions regulated under MI 61-101;

(ii) the Applications involve alleged breaches by MID of MI 61-101, but are not purely enforcement in nature;

(iii) the relief sought is future looking in that it is intended to prevent completion of the Amended DIP Financing and other possible future related party transactions between MID and MEC, without Minority Approval;

(iv) the Commission appears to have the authority to impose an appropriate remedy in the circumstances (subject to addressing the arguments in this matter related to the Commission's authority to issue the requested order);

(v) the Applicants, as substantial shareholders of MID, were directly affected by the past conduct of MID and will be directly affected by the Amended DIP Financing and any future related party transactions; accordingly, the Applicants have a sufficiently direct interest in the outcome of the Applications; and

(vi) we are satisfied that it is in the public interest in the circumstances to hear the Applications.

[111] Accordingly, we concluded that the Applicants should be permitted to bring the Applications under section 127 of the Act in these circumstances.

D. Can the Commission Make the Order Requested under Section 127 of the Act?

1. Submissions

The Applicants

[112] The Applicants submitted that the Commission's powers under section 127 of the Act can be exercised based on past misconduct and that there is no requirement that there be a specific current or unfolding transaction to which an order would relate.

[113] The Applicants submitted that under subsection 127(1) of the Act, the Commission is given authority to make any one of a broad range of enumerated orders if, in its opinion, it is in the public interest to do so. Section 127(1)3 provides, in part, as follows:

> The Commission may make one or more of the following orders if in its opinion it is in the public interest to make the order or orders:
>
> …
>
> 3. An order that *any exemptions in Ontario securities law* do not apply to a person or company permanently or for such period as is specified in the order [emphasis added].

[114] Subsection 127(1)3 casts a wide net and includes "any exemptions in Ontario securities law". That provision is not qualified in any respect and clearly relates to the body of Ontario securities law as a whole.

[115] The Applicants submitted that paragraph (g) of section 5.1 of MI 61-101 (relating to downstream transactions) clearly amounts to an exemption from Ontario securities law. The essence of section 5.1 is to grant exemptions from the requirements of Part 5 of MI 61-101. To suggest that section 127 is limited to only "enumerated" exemptions flies in the face of the principles underlying the Act.

MID

[116] MID submitted that the Commission's role under section 127 is to restrain future conduct that is likely to be prejudicial to the public interest. MID referred to *Asbestos* and submitted that section 127 is a regulatory provision that should not be used merely to remedy past misconduct alleged to have caused harm to private parties.

[117] MID also referred to *Mithras* where the Commission described its public interest jurisdiction and role as follows:

> As a result, we see no basis at all upon which to make any order against any of the Respondents in respect of their modified structure. That structure may (or may not) have breached the terms of

> clause 14(g). But that is not the point. *Under sections 26, 123 [now section 127] and 124 of the Act, the role of this Commission is to protect the public interest by removing from the capital markets – wholly or partially, permanently or temporarily, as the circumstances may warrant – those whose conduct in the past leads us to conclude that their conduct in the future may well be detrimental to the integrity of those capital markets. We are not here to punish past conduct; that is the role of the courts, particularly under section 118 of the Act. We are here to restrain, as best we can, future conduct that is likely to be prejudicial to the public interest in having capital markets that are both fair and efficient. In so doing we must, of necessity, look to past conduct as a guide to what we believe a person's future conduct might reasonably be expected to be; we are not prescient, after all* [emphasis added].
>
> *Re Mithras Management* (1990), 13 O.S.C.B. 1600 ("***Mithras***") at para. 13.

[118] MID submitted that the Applications relate primarily to alleged past breaches of MI 61-101 and that, accordingly, the Commission has no jurisdiction to issue, and should not issue, the order requested under section 127. MID also submitted that such an order can be issued only with respect to a future transaction if that transaction is abusive. MID submitted that there is no such abusive transaction before us.

MEC

[119] MEC submitted that the Commission's discretion to grant relief under section 127 of the Act ought to be exercised in a forward-looking manner, and not retrospectively based on past conduct, as asserted by the Applicants.

Staff

[120] Staff submitted that the only imminent or unfolding transaction raised in the Applications which may invoke the Commission's public interest jurisdiction is MID's intention to complete the Amended DIP Financing.

2. Analysis and Conclusion

[121] The principles reflected in *Asbestos* and *Mithras* have been endorsed in numerous Commission and court decisions. We accept *Asbestos* and *Mithras* as setting forth the correct principles. As discussed above, we recognise that our public interest jurisdiction is not unlimited and must be exercised within our regulatory mandate under the Act. That mandate, as specified in section 1.1 of the Act, is "(a) to provide protection to investors from unfair, improper or fraudulent practices, and (b) to foster fair and efficient capital markets and confidence in capital markets".

[122] One of our principal regulatory objectives is to prevent future conduct that may be detrimental to investors or to the integrity of the capital markets. In addition, specific and general deterrence are also appropriate regulatory objectives in issuing an order under section 127 (see *Cartaway*, *supra*).

[123] In this case, the allegation is that MID contravened MI 61-101 by failing to obtain Minority Approval for the November Transactions, the March Transactions and the Amended DIP Financing. The Applicants say, as a result, that we should prevent MID from entering into future related party transactions with MEC, without Minority Approval, in reliance upon any exemption otherwise available under MI 61-101. That is to say that we should, in effect, restrain possible future related party transactions even if they could otherwise be carried out in full compliance with MI 61-101 without the need for Minority Approval.

[124] In our view, we have the legal authority to issue the order requested by the Applicants. We believe that, where there have been clear violations of MI 61-101 (or a provision of the Act), the Commission can remove exemptions that might otherwise be available to a person in respect of future transactions where it is satisfied that to do so is in the public interest. We frequently make such orders in enforcement proceedings removing exemptions or cease trading specified persons or securities. We do that to prevent those persons from causing future harm to investors by participating in our capital markets and as a matter of specific and general deterrence. While this matter is not purely an enforcement matter, in our view, similar principles apply.

[125] We have discussed above the nature of our public interest jurisdiction and our reasons for concluding that it is appropriate to permit the Applicants to bring the Applications under section 127 (see, in particular, paragraphs 104 to 106 and 110 of these reasons). In our view, that discussion and the comments we refer to from *Asbestos* apply with equal force to the question of whether we have the authority to grant the order requested under section 127.

[126] In our view, in order for us to exercise our authority under section 127 in circumstances such as these, it is not necessary for there to be a specific current and unfolding transaction. Having said that, the Amended DIP Financing is a current transaction the completion of which is conditional upon the Commission rendering a decision in favour of MID in connection with the Applications and MID has indicated that it may enter into future related party transactions with MEC with respect to the

possible purchase of assets from MEC. That is sufficient, in our view, to distinguish the circumstances before us from a purely enforcement proceeding.

[127] We recognise, however, that issuing the order requested by the Applicants would be an extraordinary action and that we would do so only where there has been a clear and flagrant breach of MI 61-101. The general principle that we apply is to issue the least intrusive order that is sufficient in the circumstances to accomplish our regulatory objectives. We agree with Staff that we should exercise extreme caution in issuing an order that could cause significant financial harm to a number of persons (including third parties) and that would have the effect of significantly restricting future transactions that are being carried out in full compliance with Ontario securities law.

[128] In conclusion, in our view, we have the authority to issue the order requested by the Applicants under section 127 of the Act.

E. The Relevant Provisions of MI 61-101

[129] This matter required us to interpret and apply the provisions of MI 61-101 to the transactions before us. In doing so, we must give effect to the language of the Instrument but we must do so in the context of the regulatory objectives of MI 61-101. We must also consider the true substance and economic effect of the transactions that are being challenged.

[130] Our approach to interpreting and applying MI 61-101 should be as articulated by the Commission in *Federal Navigation* as follows:

> In conclusion, the decision of the Commission has been based upon an interpretation of the provisions of the By-law arrived at in light of the Commission's understanding of the philosophy and the intent behind the rules established by those provisions. In restating the basic tenets or general principles discussed in the Kimber Report, the Commission wishes [forcibly] to draw to the attention of the public that, although technical interpretation is necessary, it is the expectation of the Commission that the participants in the capital markets of this province will be guided by the basic philosophy and rationale from which the securities laws of this province were developed. The sophisticated gloss of technicality must not be used to obscure the true intent and import of the basic philosophies that underlie the securities laws of the province. Technical interpretations that run contrary to these basic philosophies and principles will not be acceptable to the Commission.
>
> *Re Federal & Commerce Navigation Ltd.* (1981), 1 O.S.C.B. 20 ("***Federal Navigation***") at paras. 25-26.

[131] The purpose of MI 61-101 and its predecessors is to regulate specific transactions, such as related party transactions and business combinations, that are capable of being abusive or unfair to minority shareholders (see section 1.1 of Companion Policy 61-101 CP – to MI 61-101 (the "**Companion Policy**") and *Re Sears Canada Inc.* (2006), 22 B.L.R. (4th) 267, aff'd (2006), 21 B.L.R. (4th) 311 (Ont. Div. Ct.) ("***Sears***") at para. 256).

[132] Part 5 of MI 61-101 applies to certain related party transactions. A related party transaction includes transactions between a controlling shareholder such as MID, and an entity that it controls, such as MEC. The term "related party transaction" is defined in section 1.1 of MI 61-101, and provides in part as follows:

> "related party transaction" means, for an issuer, a transaction between the issuer and a person that is a related party of the issuer *at the time the transaction is agreed to*, whether or not there are also other parties to the transaction, as a consequence of which, either through the transaction itself or together with connected transactions, the issuer directly or indirectly
>
> (a) purchases or acquires an asset from the related party for valuable consideration,
>
> …
>
> (j) borrows money from or lends money to the related party, or enters into a credit facility with the related party,
>
> …
>
> (l) materially amends the terms of an outstanding debt or liability owed by or to the related party, or the terms of an outstanding credit facility with the related party….[emphasis added].

[133] Part 5 of MI 61-101 does not prohibit related party transactions and the Commission does not view such transactions as being inherently unfair (see section 1.1 of the Companion Policy). Rather, MI 61-101 regulates certain related party transactions by giving minority shareholders two types of procedural protections. First, section 5.4 requires that an issuer proposing to carry out a related party transaction must obtain a formal valuation in respect of the subject matter of the transaction. Second, section 5.6 provides that a related party transaction shall not be completed without Minority Approval. These regulatory protections are intended to ensure fairness to minority shareholders and to limit the potential for abuse in related party transactions.

[134] Not all related party transactions require these protections. In some circumstances, conflict of interest or fairness concerns either may not be present or may not be sufficiently acute given the relative economic significance of the particular related party transaction to the issuer. The scope of application of MI 61-101 has been carefully defined to apply where there are significant concerns that conflicts of interest may arise that may result in unfairness or abuse to minority shareholders. At the same time, it is possible for the provisions of MI 61-101 to apply by their terms to a related party transaction that, in the particular circumstances, is not unfair or abusive to minority shareholders and that does not give rise to the concerns that MI 61-101 was intended to address.

[135] The related party transactions for which minority shareholder protections are not required under MI 61-101 are determined in one of two ways. First, some related party transactions are explicitly carved out of the application of Part 5 of MI 61-101 by section 5.1. Second, related party transactions may qualify for specific exemptions from Minority Approval or the requirement to prepare a formal valuation (under sections 5.5 and 5.7 of MI 61-101).

The Downstream Transaction Exception

[136] Section 5.1(g) of MI 61-101 provides as follows:

> This part does not apply to an issuer carrying out a related party transaction if
>
> …
>
> (g) the transaction is a downstream transaction for the issuer.

[137] A "downstream transaction" is defined in MI 61-101 as follows:

> … for an issuer, a transaction between the issuer and a related party of the issuer if, at the time the transaction is agreed to
>
> (a) the issuer is a control person of the related party; and
>
> (b) *to the knowledge of the issuer after reasonable inquiry*, no related party of the issuer, other than a wholly-owned subsidiary entity of the issuer, *beneficially owns or exercises control or direction over*, other than through its interest in the issuer, more than five per cent of any class of voting or equity securities of the related party that is a party to the transaction [emphasis added].

[138] There are two elements to the Downstream Exception. First, the issuer must be a control person of the related party with which it is transacting (the "**Transacting Related Party**") at the time the transaction is agreed to. Second, *to the knowledge of the issuer after reasonable inquiry*, no related party of the issuer may beneficially own or exercise control or direction over more than 5% of the voting or equity securities of a class of the Transacting Related Party (other than through its interest in the issuer).

[139] The Downstream Exception is based on the assumption that when an issuer enters into a transaction with a related party that it controls, the issuer will act in its own best interests, thus also benefiting its minority shareholders. For downstream transactions, there is no need to provide minority shareholders with procedural protections because there is no element of conflict of interest present.

[140] This underlying assumption may be jeopardized, however, when a related party of an issuer holds a direct interest in the Transacting Related Party. Where such an interest exists, the related party may have an economic incentive to exercise its control or influence to cause the issuer to enter into a transaction that is unfavourable to the issuer but that is favourable to the Transacting Related Party and thus benefits the related party. This conflict of interest could lead the issuer (notwithstanding the corporate law duties and obligations of its directors and officers) to ignore its best interests (and consequently those of its shareholders) with the result that the Transacting Related Party may obtain the benefits of a transaction (that also benefits the related party) while the costs are borne by the issuer and its shareholders. The requirement for Minority Approval and the valuation requirement apply to related party transactions in these circumstances.

[141] We have referred to the Downstream Exception in these reasons as an "exception" rather than an "exemption". MID argued that if the Downstream Exception applies, then MI 61-101 simply does not apply to the relevant transactions. That is in contrast to the Market Cap Exemption that exempts a transaction from the specific requirement for Minority Approval (and the requirement to prepare a formal valuation) but leaves the transaction otherwise subject to the applicable provisions of MI 61-101. In MID's submission, the latter is properly viewed as an "exemption" while the former is a carve out or an "exception". The distinction is relevant because the Commission's power under subsection 127(1)3 of the Act is to "order that *exemptions* contained in Ontario securities law do not apply …"[emphasis added].

[142] In our view, the Downstream Exception is, in legal effect and common parlance, an exemption contained in Ontario securities law (which, as defined, includes rules of the Commission) and should be treated as such. Accordingly, we believe we have authority to remove that exemption on the terms and conditions we determine to be in the public interest. We would add that, in any event, we have a cease trade power under section 127 that we believe could be exercised to accomplish the same objective.

The Market Cap Exemption

[143] Sections 5.5(a) and 5.7(a) of MI 61-101 exempt an issuer from complying with the requirements for Minority Approval and for the preparation of a formal valuation where "at the time the transaction is agreed to, neither the fair market value of the subject matter of, nor the fair market value of the consideration for, the transaction … exceeds 25 per cent of the issuer's market capitalization …" determined in accordance with MI 61-101. "Market capitalization" of an issuer is defined in section 1.1 of MI 61-101.

[144] The Market Cap Exemption establishes the minimum size for a related party transaction for which Minority Approval and a formal valuation are required under MI 61-101. Where neither the fair market value of the subject matter of the related party transaction, nor the consideration for the transaction, exceeds 25% of the issuer's market capitalization, MI 61-101 accepts that the costs of complying with the Minority Approval and formal valuation requirements outweigh the potential benefits of obtaining that approval or such a valuation. The costs of complying with the Minority Approval requirement include the actual costs of calling and holding a shareholders' meeting, the delay required in a transaction in order to obtain that approval and the uncertainty in whether the shareholders will approve the transaction and that it will proceed. The costs of preparing a formal valuation include the fees of the independent valuer and the delay necessary for the valuer to complete its work.

[145] Accordingly, MI 61-101 reflects through the terms of the Market Cap Exemption a balancing of costs and benefits, and an issuer is required to obtain Minority Approval and a formal valuation only in respect of very substantial related party transactions.

[146] In determining whether an issuer is eligible for the Market Cap Exemption, an issuer must aggregate the fair market value of any "connected transactions" that are also related party transactions (see section 5.5(a)(iii) of MI 61-101).

[147] "Connected transactions" are defined in section 1.1 of MI 61-101 as "two or more transactions that have at least one party in common and (a) are negotiated or completed at approximately the same time or (b) the completion of at least one of the transactions is conditional on the completion of each of the other transactions". There is no doubt that this definition is, by its terms, very broad in potential application.

Conclusions

[148] There is no dispute that MID is a control person with respect to MEC or that the November Loan, the DIP Financing and the Amended DIP Financing were related party transactions for purposes of MI 61-101. The Loan Extension was also a related party transaction if it constituted a material amendment to the existing loans to which it related. The November Reorganization Proposal included certain transactions that would have been related party transactions if they had been carried out. The Stalking Horse Bid would also have been a related party transaction if assets of MEC had been purchased by MID under that bid.

[149] Clearly, there are different rationales for the Downstream Exception and the Market Cap Exemption. Either exemption may, however, apply to a related party transaction and exempt that transaction from the requirement for Minority Approval and for a formal valuation. Accordingly, the principal question we must determine is whether, at the relevant time, either the Downstream Exception or the Market Cap Exemption was available to MID in respect of the November Transactions, the March Transactions and the Amended DIP Financing.

[150] As noted above, the Downstream Exception and the Market Cap Exemption apply to exempt a related party transaction from both the requirement to obtain Minority Approval and the requirement to prepare a formal valuation. Because the submissions made to us focused primarily on the requirement for Minority Approval, we will principally address that requirement in these reasons. If we conclude that either exemption was available to exempt MID from the requirement to obtain Minority Approval, that exemption also applies to exempt MID from the requirement to prepare a formal valuation.

F. Was the Downstream Exception Available to MID?

1. Submissions

The Applicants

[151] The Applicants submitted that, commencing with the Azalea Trust Transaction, MID relied upon multiple artificial transactions in an attempt to circumvent the Minority Approval requirement for related party transactions under MI 61-101. The purpose of those transactions was to deprive MID's minority shareholders of their right to vote on and object to the November Transactions, the March Transactions and the Amended DIP Financing and the result has been substantial destruction of MID shareholder value through MID's continued support for a now bankrupt subsidiary. Since November 25, 2008, MID has advanced or agreed to advance to MEC the November Loan of up to US$125 million, the Loan Extension relating to approximately US$312 million of existing loans, the DIP Financing of up to US$62.5 million (later reduced to US$38.4 million), and the additional DIP financing of up to US$28 million. Under the Stalking Horse Bid, MID offered to purchase assets from MEC with a purchase price of approximately US$195 million.

[152] The Applicants submitted that the Downstream Exception was not available to MID in connection with the relevant related party transactions because the Azalea Trust Transaction was an artificial transaction and a sham that did not result in the disposition by Fair Enterprise of the Fair Enterprise MEC Shares. The Applicants say that Fair Enterprise simply "parked" the Fair Enterprise MEC Shares with the Azalea Trust. They also submitted that MID failed to make reasonable inquiry with respect to the ownership of the Fair Enterprise MEC Shares and the terms of the Azalea Trust Transaction.

[153] The Applicants submitted that notwithstanding the Azalea Trust Transaction, MID continued to beneficially own the Fair Enterprise MEC Shares. They argued that, as a result of the breach by the Azalea Trust of the Disposition Covenant, and the non-recourse nature of the Promissory Note, MID had the right to acquire the Fair Enterprise MEC Shares. Under MI 61-101 and section 90 of the Act, that right to acquire the shares is deemed to constitute beneficial ownership of the shares.

[154] The Applicants submitted that the Commission should find that the Azalea Trust Transaction was ineffective to circumvent the Minority Approval requirement of MI 61-101. In addition, based on MID's past misconduct, the Applicants submitted that the Commission should exercise its public interest authority to prevent any further abuse by MID through future related party transactions with MEC.

MID

[155] MID submitted that the Azalea Trust Transaction was not artificial, contrived or lacking in *bona fides*, nor designed to frustrate the underlying philosophy of MI 61-101 or the reasonable expectations of the shareholders of MID.

[156] MID submitted that there is nothing abusive, illegal, untoward or improper with parties structuring a transaction so as to ensure that they comply in every respect with potentially available exemptions or exclusions in MI 61-101, so long as the transactions comply with applicable law.

[157] MID submitted that, in any event, at the time of the Azalea Trust Transaction, it made reasonable inquiry as to whether any related party of MID beneficially owned or exercised control or direction over more than 5% of any class of voting or equity securities of MEC. MID says that Fair Enterprise represented to it that, as of November 26, 2008, it did not own any such interest. MID submitted that its legal counsel (i) made inquiries by telephone and by e-mail (the e-mail exchange is described in paragraph 41 of these reasons), (ii) reviewed the draft news release to be issued by Azalea Trust in connection with the Azalea Trust Transaction, and (iii) reviewed subsequent public securities filings made by members of the Stronach Group, all of which confirmed that neither Mr. Stronach nor any other member of the Stronach Group beneficially owned or exercised control or direction over more than 5% of any class of voting or equity securities of MEC. As a result of and based on those reasonable inquiries, MID submitted that it was entitled to rely on the Downstream Exception regardless of whether Fair Enterprise continued to beneficially own or exercise control or direction over the Fair Enterprise MEC Shares.

[158] MID submitted that the November Transactions, the March Transactions and the Amended DIP Financing all qualified for the Downstream Exception and, accordingly, were not subject to the requirement for Minority Approval or for the preparation of a formal valuation.

Fair Enterprise

[159] Fair Enterprise submitted that the Downstream Exception applied to all of the relevant related party transactions between MID and MEC. Fair Enterprise did own more than 5% of the voting or equity securities of MEC through its ownership of the Fair Enterprise MEC Shares, but Fair Enterprise disposed of those shares on November 25, 2008 pursuant to the Azalea Trust Transaction. Fair Enterprise submitted that (i) the Azalea Trust Transaction was a valid and *bona fide* sale transaction under which Fair Enterprise disposed of the Fair Enterprise MEC Shares, and (ii) Fair Enterprise did not subsequently regain

ownership of those shares. Accordingly, Fair Enterprise says that MID was entitled to rely on the Downstream Exception with respect to the November Transactions, the March Transactions and the Amended DIP Financing.

Staff

[160] Staff submitted that the November Transactions, the March Transactions and the Amended DIP Financing did not exploit gaps or loopholes in MI 61-101. Staff submitted that the Stronach Group's motivation for disposing of the Fair Enterprise MEC Shares is irrelevant to whether the Downstream Exception was available. MI 61-101 does not prevent issuers from organizing their affairs to create the factual basis for an exemption available under the Instrument. If the factual basis for reliance on the Downstream Exception exists, there is no need to obtain Minority Approval for the relevant related party transactions.

[161] Staff also submitted that the Azalea Trust Transaction did not undermine the reasonable expectations of MID shareholders. There is no evidence to suggest that MID shareholders had any reasonable expectation that the Stronach Group would maintain its ownership of the Fair Enterprise MEC Shares. As a result, Staff submitted that it was reasonable to expect that a sale of the Fair Enterprise MEC Shares could happen at any time, such that the Downstream Exception would be available to MID.

[162] Staff submitted that MID made reasonable inquiry at the time it entered into the November Transactions as to the ownership and control or direction of the Stronach Group over shares of MEC and therefore qualified for the Downstream Exception. Staff submitted that it is not unreasonable for an issuer to rely on confirmation from legal counsel for a related party about the facts forming the basis for the availability of the Downstream Exception, unless the circumstances suggest the need for further inquiry.

2. Analysis and Conclusion

[163] The Applicants submitted that the Azalea Trust Transaction was an artificial transaction and a sham that did not result in the disposition by Fair Enterprise of the beneficial ownership of the Fair Enterprise MEC Shares. If that is the case, the Downstream Exception was not available by its terms for the November Transactions or the March Transactions. (The Downstream Exception would have been available for the Amended DIP Financing because the Fair Enterprise MEC Shares were sold by Azalea Trust to a third party on June 29, 2009 (see paragraph 54 of these reasons)). The Applicants also say that the Fair Enterprise MEC Shares were simply "parked" with the Azalea Trust to ostensibly permit the relevant related party transactions to take place without Minority Approval.

[164] The Applicants alleged that the Azalea Trust Transaction was not entered into on normal or usual commercial terms, thus demonstrating that the transaction was a sham and that it was ineffective to transfer the beneficial ownership of the Fair Enterprise MEC Shares to the Azalea Trust. In particular, the Applicants questioned the following aspects or terms of that transaction:

(i) the purchaser was a trust established for purposes of the Azalea Trust Transaction by Mr. Timothy Jones, the former mayor of Aurora, Ontario and a paid consultant to Neighbourhood Network, a community initiative founded by Belinda Stronach;

(ii) the Promissory Note representing the purchase price did not bear interest and was repayable on a non-recourse basis only out of the net proceeds of the sale of the Fair Enterprise MEC Shares;

(iii) the Fair Enterprise MEC Shares were to be sold by the purchaser as soon as practicable after November 25, 2008 (the date of the Azalea Trust Transaction) and in an orderly fashion, when permitted by applicable securities law; and

(iv) the net proceeds of sale in excess of the amounts due under the Promissory Note were to be donated to charity.

[165] The Applicants noted that the Fair Enterprise MEC Shares were not registered in the name of Azalea Trust until April 13, 2009, and that Azalea Trust did not sell the shares until June 29, 2009.

[166] There is certainly some merit to the submissions made by the Applicants with respect to this issue. Immediately prior to the Azalea Trust Transaction, Fair Enterprise held the beneficial ownership of the Fair Enterprise MEC Shares which had a fair market value of approximately $886,000. The Fair Enterprise MEC Shares were then sold (for no cash consideration and on a non-recourse basis) to a newly constituted trust of which the settlor and the sole director and officer of the trustee was an individual with at least some connection to the Stronach family. After that transfer, Fair Enterprise continued to have a direct economic interest in the Fair Enterprise MEC Shares with a fair market value of approximately $886,000, represented by the non-recourse Promissory Note. While Fair Enterprise no longer held an interest in the upside value of the shares, in the

circumstances, that value was clearly more theoretical than real. But if the fair market value of the shares fell, Fair Enterprise directly suffered that loss.

[167] Further, the Azalea Trust Transaction was only a first step in Fair Enterprise disposing of the beneficial ownership of the Fair Enterprise MEC Shares. The Azalea Trust was obligated by the Disposition Covenant to sell the shares as soon as practical after acquiring them, a step that the Azalea Trust was at best tardy in completing. Accordingly, one could say that Fair Enterprise "parked" the Fair Enterprise MEC Shares with the Azalea Trust by disposing of the beneficial ownership of those shares in technical legal terms but, in true economic terms, little changed. Applicants also noted that, on March 27, 2009, Fair Enterprise released the Azalea Trust from its obligations under the Promissory Note and each party mutually released all claims arising in connection with the Azalea Trust Transaction. That thereby ended any interest Fair Enterprise then had in the Fair Enterprise MEC Shares.

[168] We note, however, that there is no evidence to suggest that the Azalea Trust Transaction was other than what it appeared to be or that there was any attempt to disguise the true nature of it. That transaction was documented and publicly announced and there appears to be no dispute as to what the specific terms of the transaction were (there is, of course, a dispute as to the legal effect of those terms).

[169] The Azalea Trust Transaction appears to have been a *bona fide* transaction structured as it was in order to permit Fair Enterprise to dispose of the Fair Enterprise MEC Shares and to gift any proceeds in excess of the then fair market value to charity. Those objectives substantially dictated the terms of the Azalea Trust Transaction. While the terms of that transaction may not have been normal commercial terms, that does not mean that the transaction was not *bona fide*. It did not purport to be a normal commercial transaction. The objective of the transaction was to attempt to align the interests of the Stronach Group with the interests of the other shareholders of MID by disposing of the beneficial ownership of the Fair Enterprise MEC Shares. If the Azalea Trust Transaction accomplished that purpose, the Stronach Group would have had no interest in MEC except through its ownership of shares of MID. As a result, the interests of the Stronach Group and the other shareholders of MID would have been aligned and any potential concerns under MI 61-101 would have ceased to exist.

[170] There is nothing inappropriate in a person organizing its affairs or completing a *bona fide* transaction in order to qualify for the Downstream Exception. The Stronach Group wished to dispose of the Fair Enterprise MEC Shares, at least in part, to align its interests with those of the minority shareholders of MID. It chose to do so in a transaction that has some relatively unusual features. That is irrelevant, however, if Fair Enterprise, as a legal matter and as a matter of economic substance, disposed of the beneficial ownership of the Fair Enterprise MEC Shares and no longer exercised control or direction over those shares. If the Stronach Group did so by virtue of the Azalea Trust Transaction, then it no longer held an interest that created a potential conflict of interest or prevented reliance by MID on the Downstream Exception.

[171] In our view, the Azalea Trust Transaction was not an artificial transaction or a sham. While it is a close call, on balance, we are prepared to recognise the legal effect of the Azalea Trust Transaction in accordance with its terms. That legal effect was the disposition by Fair Enterprise of the beneficial ownership of the Fair Enterprise MEC Shares to Azalea Trust. As discussed more fully below, however, we will not ignore the economic substance of the Azalea Trust Transaction in considering the application of MI 61-101.

Deemed Beneficial Ownership of the Fair Enterprise MEC Shares

[172] In determining the beneficial ownership of securities for purposes of the Downstream Exception, section 90 of the Act applies. Section 90 provides that:

> "in determining beneficial ownership … at any given date … the person or company shall be deemed to have acquired and to be the beneficial owner of a security … if the person or company … has a right … permitting … the person or company, whether or not on conditions, to acquire beneficial ownership of the security within 60 days … ".

[173] The Applicants submitted in an alternative argument that Fair Enterprise continued to be the beneficial owner of the Fair Enterprise MEC Shares after the completion of the Azalea Trust Transaction because Fair Enterprise had the right to acquire those shares as a result of Azalea Trust's breach of the Disposition Covenant. The argument is that, at least by the time of the March Transactions, the existence of that right meant that Fair Enterprise was deemed to be the beneficial owner of the Fair Enterprise MEC Shares within the meaning of section 90 of the Act and for purposes of the Downstream Exception.

[174] It seems to us that there are several problems with that submission. First, it is not clear that Azalea Trust was in breach of the Disposition Covenant. Certainly, Fair Enterprise was the party entitled to take that position and it did not allege any such breach. There was also some evidence before us as to why Azalea Trust did not or could not immediately dispose of the shares (see paragraph 50 of these reasons). Those considerations may have constituted a valid defence to any allegation by Fair Enterprise that Azalea Trust was in breach of the Disposition Covenant.

[175] Second, if there was a breach of the Disposition Covenant, it is not clear on the evidence before us that Fair Enterprise had the right, as a result, to acquire the Fair Enterprise MEC Shares within 60 days. It may have had a legal cause of action to require the disposition of the shares and to obtain the net proceeds. That, however, is not a specific right to acquire the shares. We did not see any express right of Fair Enterprise in the relevant legal documents to foreclose on the shares (that is, to take ownership of the shares in full settlement of the debt or obligation).

[176] Further, even if Fair Enterprise is viewed as having a right to acquire the shares by reason of the alleged default by Azalea Trust, there is no certainty that Fair Enterprise could, in fact, exercise that right by taking legal action and acquire beneficial ownership of the Fair Enterprise MEC Shares within 60 days.

[177] It does not seem to us that section 90 of the Act was intended to or should apply to the type of qualified legal rights Fair Enterprise would have had under the terms of the Promissory Note and the related documents if a default had occurred under them.

[178] Accordingly, we have concluded that Fair Enterprise was not deemed to beneficially own the Fair Enterprise MEC Shares, within the meaning of section 90 of the Act, after the Azalea Trust Transaction.

Control or Direction

[179] We must also address whether Fair Enterprise continued to exercise control or direction over the Fair Enterprise MEC Shares after the Azalea Trust Transaction. We have some concern that Fair Enterprise remained the registered owner of those shares until April 13, 2009 and that the relevant share certificates were not delivered to Azalea Trust when the Azalea Trust Transaction was completed (those certificates were not delivered until April 17, 2009). As a result, one can argue that Fair Enterprise continued to have the ability to exercise control or direction over those shares as the registered holder.

[180] The legal test we must apply under the Downstream Exception is whether at the relevant time Fair Enterprise "exercised" control or direction over the Fair Enterprise MEC Shares. That is typically taken to mean the ability to exercise voting or dispositive power over shares. Fair Enterprise did not have the legal right to exercise control or direction over the Fair Enterprise MEC Shares because Azalea Trust was the beneficial owner of them and that ownership was not qualified in any way. If Fair Enterprise had purported to exercise control or direction over the Fair Enterprise MEC Shares, that exercise would have been in contravention of Azalea Trust's rights as beneficial owner of the shares. Further, there is no evidence before us that Fair Enterprise actually exercised, or purported to exercise, any control or direction over the Fair Enterprise MEC Shares after the completion of the Azalea Trust Transaction.

[181] We note that the 13D filed by Azalea Trust after the Azalea Trust Transaction also contained the following disclosure:

> The Trustee has the sole power to vote or to direct the vote, and the sole power to dispose or direct the disposition of all MECA Shares [MEC Class A Shares] owned by the Trust. Mr. Jones, as the sole director and sole officer of the Trustee, may be deemed to have the sole power to vote or to direct the vote, and the sole power to dispose or direct the disposition of, all MECA Shares [MEC Class A Shares] owned by the Trust.

That is certainly not determinative of the issue for our purposes, but it does indicate Azalea Trust's view as to who exercised control or direction over the Fair Enterprise MEC Shares after the Azalea Trust Transaction.

[182] Based on the foregoing, in our view, Fair Enterprise did not, as a legal matter, beneficially own or exercise control or direction over the Fair Enterprise MEC Shares after completion of the Azalea Trust Transaction and Fair Enterprise did not, in fact, exercise control or direction over those shares after that transaction.

Reasonable Inquiry by MID

[183] The Applicants also alleged that MID failed to make reasonable inquiry in the circumstances with respect to the direct ownership by members of the Stronach Group of securities of MEC and the terms of the Azalea Trust Transaction. Having failed to do so, the Applicants submitted that MID could not rely on the Downstream Exception.

[184] There are a number of circumstances that might have led MID to make further inquiries with respect to the Stronach Group's direct interest in MEC. Those circumstances include the fact that MID knew that Fair Enterprise owned the Fair Enterprise MEC Shares, representing a direct 21.5% interest in the outstanding MEC Class A Shares, and that Fair Enterprise had purported to sell the Fair Enterprise MEC Shares, on the eve of the November Transactions, to a newly established trust. MID also knew that transaction was being effected, at least in part, to permit MID to rely on the Downstream Exception.

[185] In the circumstances, we believe that MID should have done more than simply rely on (i) telephone conversations and the brief e-mail exchange among legal counsel confirming their "understandings" with respect to the direct share ownership by

the Stronach Group in MEC (see paragraph 41 of these reasons), (ii) a draft of the news release that was to be issued by the Azalea Trust publicly announcing the Azalea Trust Transaction (see paragraph 42 of these reasons for the terms of the release that was issued), and (iii) the subsequent public filings describing the Azalea Trust Transaction. That news release failed to make full disclosure of all of the key terms of the Azalea Trust Transaction (see paragraph 46 of these reasons) and review of those subsequent filings cannot assist MID in demonstrating reasonable inquiry at the time it purported to rely on the Downstream Exception. In our view, the circumstances suggested the need for further inquiry.

[186] MID has the onus of showing for purposes of the Downstream Exception that it made reasonable inquiry with respect to the direct share ownership by the Stronach Group in MEC. We are not prepared to conclude that MID has satisfied that onus in the circumstances. We believe that MID should have made more inquiries with respect to the specific terms of the Azalea Trust Transaction and that it should have received direct representations from the relevant related parties as to their direct ownership of MEC shares and as to any other facts supporting reliance by MID on the Downstream Exception.

[187] We note that if MID had satisfied its onus, it would have been entitled to rely on the Downstream Exception regardless of the terms of the Azalea Trust Transaction and regardless of whatever share interest the Stronach Group might have held directly in MEC. From a regulatory perspective, that entitlement has significant implications for the application of the substantive provisions of MI 61-101. If an issuer wants a "free pass" for a related party transaction based on its lack of knowledge of circumstances that are known to a related party, there may be an obligation to do more than was done here. We reiterate that the onus of showing reasonable inquiry was on MID. Market participants can expect the Commission to be sceptical of submissions made as to the limited knowledge of related parties when the Commission is assessing whether that onus has been satisfied, particularly in circumstances such as these.

[188] We would add that we have come to a conclusion on this issue without all of the evidence that we would have liked with respect to the specific knowledge of the various parties and their legal counsel and with respect to all of the telephone conversations and actions that may have taken place. It is difficult in an abbreviated proceeding such as this to determine exactly who knew what and when and whether that knowledge should be attributed as a legal matter to MID. We also recognise that the obligation to make reasonable inquiry under MI 61-101 is not the same as the obligation to make a reasonable investigation to establish a due diligence defence with respect to a misrepresentation in a prospectus. The latter is clearly the more stringent requirement.

[189] If the Downstream Exception was, on the facts, available to MID, then it is irrelevant whether MID made reasonable inquiry with respect to what interests the Stronach Group may have held directly in MEC. In our view, the failure to make reasonable inquiry does not disqualify a person from relying on the Downstream Exception if it is otherwise available on the facts. It is the reverse that is true: if reasonable inquiry is made and a person has no knowledge to the contrary, that person is entitled to rely on the responses to the inquiry in determining the availability of the Downstream Exception, regardless of what the actual facts and circumstances known to a related party may be.

Fair Enterprise's Continuing Economic Interest in MEC

[190] The legal conclusion that Fair Enterprise no longer beneficially owned or exercised control or direction over the Fair Enterprise MEC Shares after the Azalea Trust Transaction is not, however, the end of the analysis. As noted above, after the Azalea Trust Transaction, Fair Enterprise continued to have a direct economic interest in the Fair Enterprise MEC Shares through holding the Promissory Note. The amounts due under that note were payable only out of the net proceeds of the sale of the shares. Fair Enterprise did not have any interest in the upside, if the shares increased in value, but any such increase in value, in the circumstances, was very unlikely. But if the fair market value of the shares fell, Fair Enterprise directly suffered that loss. As discussed above, in economic substance, there was little change in the interest of Fair Enterprise in the Fair Enterprise MEC Shares as a result of the Azalea Trust Transaction (see the discussion in paragraphs 166 and 167 of these reasons).

[191] As a result, one can argue that the Stronach Group continued to have a direct economic interest in shares of MEC that could give rise to the type of potential conflict of interest that the related party transaction provisions of MI 61-101 were intended to address. We have not concluded that Fair Enterprise's continuing economic interest in the Fair Enterprise MEC Shares gave rise to an actual conflict of interest in the circumstances, but we believe that the on-going interest at least raises the question whether, as a matter of substance, the Downstream Exception ought to be available in respect of the November Transactions, the March Transactions and the Amended DIP Financing.

[192] Accordingly, we will address the application of MI 61-101 to those transactions on the assumption that the Stronach Group continued to have an interest in the Fair Enterprise MEC Shares that could have disqualified MID from relying on the Downstream Exception. In doing so, we will consider the spirit and intent of the provisions of MI 61-101 and we will approach the matter in accordance with the following principles articulated by the Commission in *Sterling Centrecorp.*:

> … the Commission needs to have regard to all of the facts, all of the policy considerations at play, all of the underlying circumstances of the case, and all of the interests affected by the matter and the remedy sought. As described above, section 91 of the Act and Rule 61-501 [now MI 61-101]

> fundamentally must be interpreted to ensure protection of the minority. At the same time, we recognize the Commission's broad mandate as articulated in the Re British Columbia Forest Products case:
>
> However, the Commission's responsibility and duty is not only to the minority security holders but to the capital markets as a whole and to all participants therein whether majority or minority security holders. Accordingly, just as the Commission must be vigilant to protect minority security holders so too it must be vigilant not to abuse the rights of majority security holders …
>
> *Re Sterling Centrecorp. Inc.* (2007), 30 O.S.C.B. 6683 ("***Sterling Centrecorp.***") at para. 212.

G. Was the Market Cap Exemption Available to MID in respect of the November Transactions?

1. Submissions

The Applicants

[193] The Applicants submitted that the Market Cap Exemption was not available to MID for the November Loan, the Loan Extension or the November Reorganization Proposal.

[194] The Applicants submitted that the November Loan and the Loan Extension constituted part of the same transaction or were connected transactions. The November Loan (US$125 million) and the Loan Extension (of US$312 million) together amount to US$437 million. That amount exceeded 25% of MID's market capitalization which, at the relevant time, was approximately US$146 million (determined in accordance with MI 61-101).

[195] The Applicants also submitted that the November Reorganization Proposal was a connected transaction to the November Loan and the Loan Extension.

MID

[196] MID submitted that the November Loan was a transaction which is separate from both the Loan Extension and the November Reorganization Proposal. On that basis, MID asserted that the November Loan qualified for the Market Cap Exemption. (As noted above, the November Loan was for US$125 million and 25% of MID's market capitalization at the relevant time was approximately US$146 million.) MID also submitted that the November Loan, the Loan Extension and the November Reorganization Proposal are not "connected transactions" because the November Loan was not conditional upon the Loan Extension or the November Reorganization Proposal.

[197] MID also submitted that the Loan Extension was not a related party transaction in any event because the Loan Extension was not a material amendment of the terms of the existing loans to which it related (as referred to under clause (1) of the definition of "related party transaction" in MI 61-101). MID also submitted that the Loan Extension was not "an amendment" to the existing loans because the extension was made unilaterally by MID as it was legally entitled to do.

[198] MID also submitted that the November Reorganization Proposal was to be put to shareholders for approval, including Minority Approval, and, accordingly, should not be considered in determining whether the Market Cap Exemption was available for the November Loan or the Loan Extension.

Staff

[199] In Staff's submission, the evidence does not suggest that MID divided up the November Transactions to avail itself of the Market Cap Exemption. By definition, the November Loan and the Loan Extension were connected because they were negotiated at the same time and were between the same parties, but those transactions were not linked in substance. Staff submitted that the Commission should give that factor considerable weight in determining whether the Market Cap Exemption was available in respect of the November Loan, the Loan Extension and the November Reorganization Proposal.

2. Analysis and Conclusions as to the November Transactions

[200] As noted above, there is no dispute that the November Loan was a related party transaction between MID and MEC for purposes of MI 61-101. The Loan Extension was also a related party transaction if it constituted a material amendment to the existing loans from MID to MEC to which it related.

[201] The availability of the Market Cap Exemption is determined based on the fair market value of a transaction relative to the issuer's market capitalization. The purpose of the "connected transactions" concept is to link related transactions for this purpose and, among other things, to prevent an issuer from arbitrarily dividing up or staging a transaction in order to be able to

rely on the Market Cap Exemption for each separate step or transaction. It is intended to capture transactions that are linked in substance but that may be divided as a matter of form. Accordingly, the concept of "connected transactions" is an anti-avoidance provision.

[202] At the same time, the definition of "connected transactions" is, by its terms, extremely broad and may capture transactions that, for legitimate business or economic reasons, should not be viewed as linked. While we are not prepared to limit the application of the concept to only transactions that are arbitrarily divided up or staged, we recognise that there may be transactions captured by the breadth of the term that one can argue should not be appropriately linked for purposes of the Market Cap Exemption.

[203] We note that subsection 2.7(1) of the Companion Policy provides as follows:

> "Connected transactions" is a defined term in the Instrument, and reference is made to connected transactions in a number of parts of the Instrument. For example, subparagraph (a)(iii) of section 5.5 of the Instrument requires connected transactions to be aggregated, in certain circumstances, for the purpose of determining the availability of the formal valuation exemption for a related party transaction that is not larger than 25 per cent of the issuer's market capitalization. In other circumstances, it is possible for an issuer to rely on an exemption for each of two or more connected transactions. However, we may intervene if we believe that a transaction is being carried out in stages or otherwise divided up for the purpose of avoiding the application of a provision of the Instrument.

That paragraph suggests that the Commission expects connected transactions to be aggregated for purposes of determining the availability of the Market Cap Exemption but that "in other circumstances", it is possible for an issuer to rely on an exemption for two or more transactions that might be viewed as connected. However, in the latter case, the Commission may intervene if a transaction is being carried out in stages or is otherwise divided up for the purpose of avoiding the application of a provision of the Instrument.

[204] In our view, the November Loan and the Loan Extension are connected transactions within the meaning of MI 61-101. They were both negotiated and completed at the same time, were between the same parties and related to the on-going financing of MEC. They are clearly linked in substance from a business perspective. While there is no suggestion that they were structured as separate transactions for the purpose of avoiding the requirement for Minority Approval, that is not a condition precedent to concluding that two transaction are connected transactions for purposes of the Market Cap Exemption. As we noted above, the definition of "connected transactions" is very broad and, in our view, was intended to capture, at least as a threshold matter, transactions such as the November Loan and the Loan Extension.

The Loan Extension

[205] MID argued, however, that the Loan Extension was not a related party transaction because it was not a material amendment to the relevant loans.

[206] The Loan Extension extended the repayment of the existing loans by four months, from December 1, 2008 to March 31, 2009. It is important to note, however, that at the time of the Loan Extension, it was extremely unlikely that MEC would have been able to repay the existing loans. We do not believe there is any dispute as to that conclusion and we note in this respect that (i) the November Loan was intended, in part, to keep MEC operating until MID shareholders could vote on the November Reorganization Proposal, (ii) these events were occurring in the midst of the 2008 global credit crisis, and (iii) MEC ultimately filed for bankruptcy protection before the end of the extension period. In the circumstances, MID could have simply refused to extend the loans and, as a result, the loans would have gone into default. In that event, there would have been no amendment to the loans (arguably constituting a related party transaction) and there would have been no change in the economic circumstances: MEC would nonetheless have owed MID approximately US$312 million and it is extremely unlikely that MEC would have been able to repay that amount.

[207] In the result, we believe that there is a reasonable basis to conclude that the Loan Extension was not, from MID's perspective, a material amendment to the existing loans because they likely could not have been repaid by MEC in any event. (We believe that the Loan Extension was a material amendment to the existing loans from the perspective of MEC.) That conclusion would mean that the Loan Extension was not a related party transaction and was not therefore required to be included in determining the availability of the Market Cap Exemption to the November Loan. The result would be that the Market Cap Exemption was available in respect of the November Loan and the Loan Extension was not a related party transaction for purposes of MI 61-101.

[208] Further, we concluded above that the Loan Extension was a connected transaction to the November Loan. In our view, that does not necessarily mean that it should be viewed as a new loan to MEC in the amount of US$312 million (the principal amount outstanding under the existing loans) in applying the Market Cap Exemption. As noted above, it was extremely unlikely

that MEC was going to be able to repay the existing loans in November, 2008. The business and economic decision that MID was making was whether to advance further funds to MEC to keep it operating until MID shareholders could vote on the November Reorganization Proposal. A secondary objective was to protect MID's existing secured loans to MEC. In our view, it is unrealistic in these circumstances to suggest that we should view the Loan Extension as, in effect, a new loan by MID to MEC in the amount of the existing loans. The economic substance of the November Loan and the Loan Extension was that an additional US$125 million was being loaned by MID to MEC so that MEC could continue its operations until MID shareholders could vote on the November Reorganization Proposal. In that context, the Loan Extension was simply extending the maturity date of the existing loans for four months. In our view, in economic substance, MID was not lending US$312 million to MEC by effecting the Loan Extension.

[209] The November Loan was for US$125 million and 25% of MID's market capitalization at the relevant time was approximately US$146 million. As a result, in our view, the Market Cap Exemption was available for both the November Loan and the Loan Extension (if one views the Loan Extension as a related party transaction).

The November Reorganization Proposal

[210] The November Reorganization Proposal was a relatively complex corporate reorganization that involved a number of different steps and transactions, not all of which constituted related party transactions. The November Reorganization Proposal was to be submitted to shareholders of MID for approval, including Minority Approval by the holders of MID Class A Shares. Unlike the November Loan and Loan Extension, those transactions were not to proceed absent that approval. We note that the November Loan and the Loan Extension were not conditional upon the November Reorganization Proposal being approved or proceeding.

[211] As noted above, one of the principal reasons for the November Loan and the Loan Extension was to keep MEC's business operating until shareholders could vote on the November Reorganization Proposal. In that sense, the transactions were linked; but there was an important business reason for treating the November Loan and the Loan Extension as separate from the November Reorganization Proposal. The November Loan and the Loan Extension had to occur immediately if MEC was to continue operating its business. In contrast, the November Reorganization Proposal could await the shareholder vote. Clearly, the November Loan, the Loan Extension and the November Reorganization Proposal were not arbitrarily divided up or staged for purposes of avoiding the application of MI 61-101.

[212] There was insufficient evidence before us with respect to the specific terms of the November Reorganization Proposal to come to a definitive view as to the application of MI 61-101 to the various related party transactions that were to form part of that reorganization. It appeared to us, however, that there was some further negotiation of the terms of the November Reorganization Proposal that was required. Clearly, the November Reorganization Proposal was to be completed at a different time than the November Loan and the Loan Extension. We also note that the November Reorganization Proposal was ultimately abandoned by MID and, accordingly, no related party transaction contemplated as part of the November Reorganization Proposal actually occurred. Accordingly, there was no breach of the Minority Approval requirement by reason of the November Reorganization Proposal.

[213] For these reasons, we have concluded that the November Reorganization Proposal should not be viewed as a connected transaction to the November Loan or the Loan Extension in applying the Market Cap Exemption. Because the related party transactions that formed part of the November Reorganization Proposal did not proceed, no Minority Approval was required in connection with those transactions.

The Relevant Time

[214] The Applicants also argued that MID breached MI 61-101 because the relevant exemption was not available in respect of the November Transactions *at the time the transactions were agreed to* (as required by the terms of the definition of "downstream transaction" and by the terms of the Market Cap Exemption). Section 2.8 of the Companion Policy states that the time a transaction is agreed to "should be interpreted as the time the issuer first makes a legally binding commitment to proceed with the transaction, subject to any conditions such as security holder approval."

[215] The Applicants' argument was based on the assumption that the November Transactions were first agreed to by at least November 24, 2008. It follows, according to the Applicants, that because the Azalea Trust Transaction was not completed until November 25, 2008, the Downstream Exception and the Market Cap Exemption were not available at the time when the November Transactions were first agreed to.

[216] In our view, that is too technical an interpretation of MI 61-101. It makes sense to explicitly provide in that Instrument that it is to be interpreted and applied as of the date transactions are first agreed to (although one could conceive of other possible times that could have been chosen). Fixing such a time is particularly necessary because MI 61-101 requires various value determinations to be made in applying its terms. That does not mean, however, that the Instrument should be treated as establishing a completely inflexible rule for determining whether an exemption is available. We note that in this case, regardless

of when the November Transactions were first agreed to (which may not be completely clear), they were not approved by the board of directors of MID until November 26, 2008, the day after the Azalea Trust Transaction.

[217] In any event, if after a transaction has been agreed to and before it is completed, steps are taken to ensure that an exemption is available under MI 61-101 for that transaction, there does not seem to us to be a reasonable basis to challenge the availability of that exemption, absent some abuse in relying on the exemption in the circumstances. There may be many different and legitimate reasons why a transaction would be agreed to in contemplation of the parties taking steps thereafter to ensure that, on completion, the transaction meets all regulatory requirements. We see no reason not to apply that principle in the circumstances before us.

Conclusions as to the November Loan, the Loan Extension and the November Reorganization Proposal

[218] Accordingly, in our view, the November Loan should be viewed as a single transaction for purposes of determining the availability of the Market Cap Exemption. The result is that the Market Cap Exemption was available for the November Loan and, accordingly, no Minority Approval or formal valuation was required under MI 61-101 in respect of it. As noted above, there is a reasonable basis to conclude that the Loan Extension was not a material amendment to the existing loans and was not therefore a related party transaction for purposes of MI 61-101. In any event, we concluded in the circumstances that the Loan Extension should not be viewed, in effect, as a new loan in the amount of the existing loans. Accordingly, no Minority Approval of the Loan Extension was required under MI 61-101.

[219] We also concluded that the November Reorganization Proposal should not be viewed as a connected transaction to the November Loan or the Loan Extension. Because the related party transactions contemplated as part of the November Reorganization Proposal did not proceed, there was no breach of the Minority Approval requirement in connection with those transactions.

[220] We would add that we do not agree with MID that because the Loan Extension was made unilaterally by MID, as it was entitled to do under the terms of its loans to MEC, that action did not constitute or should not be treated as an "amendment" to the existing loans for purposes of MI 61-101.

[221] As a result of our conclusions above with respect to the availability of the Market Cap Exemption, it is not necessary for us to decide whether, as a matter of substance, the Downstream Exception should have been available in respect of the November Transactions.

H. Was the Downstream Exception Available in respect of the March Transactions?

[222] There is no dispute that the DIP Financing and the Amended DIP Financing were related party transactions. The Stalking Horse Bid would also have been a related party transaction if MID had purchased assets from MEC under that bid.

[223] The DIP Financing and the Stalking Horse Bid were both agreed to at substantially the same time and involved or potentially involved related party transactions between MID and MEC. As noted above, the definition of "connected transactions" is very broad and, in our view, would as a threshold matter capture transactions such as the DIP Financing and the Stalking Horse Bid. Those transactions were, however, entered into for quite different business reasons: the DIP Financing was to fund the on-going operations of MEC while it was in bankruptcy while the Stalking Horse Bid contemplated the possible purchase by MID of certain assets of MEC. Those purchases would have occurred at fair market value as a result of the auction process that was contemplated. Those are considerations that, in the circumstances, may have led us to conclude that the DIP Financing and the Stalking Horse Bid should not be treated as connected transactions for purposes of the Market Cap Exemption. Because of our conclusions below, however, it was not necessary for us to come to a conclusion on that question.

[224] It is a different question whether, in substance, the Downstream Exception should be available in respect of the DIP Financing, the Stalking Horse Bid and the Amended DIP Financing. As noted above, Fair Enterprise continued to have a direct economic interest in the Fair Enterprise MEC Shares through the terms of the Promissory Note following the Azalea Trust Transaction. That interest could have potentially given rise to a conflict of interest of the nature intended to be addressed by MI 61-101.

[225] It is clear, however, that when MEC filed for bankruptcy protection on March 5, 2009, the Fair Enterprise MEC Shares became essentially worthless. MID reduced the carrying value of its equity interest in MEC to zero on that date. Azalea Trust subsequently sold the Fair Enterprise MEC Shares for $7,500 on June 29, 2009.

[226] Accordingly, in our view, when MEC filed for bankruptcy protection, the Fair Enterprise MEC Shares ceased to be a potential source of any conflict of interest between the Stronach Group and the minority shareholders of MID. We do not believe that, in the circumstances, it is reasonable to suggest that Fair Enterprise's continuing economic interest in those shares would have had any effect on how the Stronach Group conducted itself with respect to related party transactions between MID and MEC. MEC was indebted to MID in an amount of approximately US$372 million as at March 5, 2009. MID's principal objective

was to protect and preserve the value of its interest as a secured lender to MEC. The Stronach Group had no other conflicting interest. Accordingly, in our view, upon the making of the Bankruptcy Filings, the Fair Enterprise MEC Shares ceased to give rise to any potential conflict of interest of the nature described in paragraph 140 of these reasons.

[227] We also note that, as a result of the Bankruptcy Filings, MID also ceased to be able to exercise its share interest as a control person of MEC.

[228] We would add that the Stalking Horse Bid was ultimately withdrawn without the purchase by MID of any assets under that bid. MI 61-101 provides that, absent an exemption, an issuer shall not carry out a related party transaction unless the issuer has obtained Minority Approval. However, if no related party transaction is actually carried out, the issuer has not offended this prohibition.

[229] Accordingly, in our view, the DIP Financing, the Stalking Horse Bid and the Amended DIP Financing each qualified for the Downstream Exception both as a legal matter in interpreting the provisions of the Downstream Exception (based on our conclusions in paragraph 182 of these reasons) and as a matter of substance in considering the circumstances at the time of those transactions (based on our conclusions in paragraph 226 of these reasons).

I. Were there Insider Trading Violations in connection with the Azalea Trust Transaction?

1. Submissions

The Applicants

[230] The Applicants alleged that the carrying out of the Azalea Trust Transaction violated the insider trading prohibitions in the Act. They submitted that such violations should prevent MID from relying on the Downstream Exception in the circumstances.

[231] The Applicants submitted that Fair Enterprise was in a "special relationship" with MEC because, among other things, Fair Enterprise was a party to the Azalea Trust Transaction, a step in implementing the November Transactions. As a result, Fair Enterprise had knowledge of the November Transactions and that knowledge constituted material undisclosed information. Fair Enterprise then traded with knowledge of that information in completing the Azalea Trust Transaction.

[232] The Applicants submitted that the disclosure of the terms of the November Transactions to Mr. Jones was not in the "necessary course of business" of Fair Enterprise (within the meaning of subsection 76(2) of the Act). The purpose of the disclosure to Mr. Jones was to facilitate the purported sale by Fair Enterprise of the Fair Enterprise MEC Shares to Azalea Trust. One of the reasons for selling the Fair Enterprise MEC Shares was to make the Downstream Exception available to MID in order to permit MID to complete the November Transactions.

[233] At the time of the Azalea Trust Transaction, there was also a trading blackout in effect with respect to securities of MEC under MID's corporate policies. According to the Applicants, MID also acted inappropriately in delegating to Fair Enterprise the responsibility for assessing whether the trading blackout applied to the Azalea Trust Transaction and the Applicants submitted that the trading blackout was breached by that transaction.

[234] The Applicants also submitted that it would be contrary to the public interest to allow Fair Enterprise to disclose material undisclosed information solely for the purpose of relying on the insider trading exemption that applies where both parties to a trade have access to the same material information (see subsection 175(5) of the regulations to the Act). The Applicants contend that is an abuse of the exemption.

Fair Enterprise

[235] Fair Enterprise did not dispute that there was communication of material undisclosed information by Fair Enterprise to Mr. Jones. However, Fair Enterprise submitted that the communication was a disclosure made in the necessary course of business of Fair Enterprise because it was disclosed in the course of a "negotiation" between the parties to effect the sale of the Fair Enterprise MEC Shares. Fair Enterprise submitted that such a negotiation is recognized in section 3.3(2)(d) of National Instrument 51-201 – *Disclosure Standards*.

MID

[236] MID submitted that no insider trading occurred as a result of the Azalea Trust Transaction. Since disclosure was made by Fair Enterprise to the Azalea Trust on the evening of November 25, 2008, after the markets had closed and before the Fair Enterprise MEC Shares were purchased by the Azalea Trust, there was no misuse by Fair Enterprise of material undisclosed information.

Staff

[237] Staff raised a due process concern and submitted that not all of the parties against whom these allegations of insider trading were made are parties to this proceeding and they therefore had no ability to make full answer and defence to the allegations. Fair Enterprise has limited intervener status in this proceeding and Azalea Trust is not a party.

[238] Staff also submitted that there is an insufficient evidentiary foundation on which to make a finding on the allegations of insider trading. Staff submitted that there is a higher standard of proof required where a violation of subsection 76(1) of the Act is alleged (see *Re ATI Technologies Inc.* (2005), 28 O.S.C.B. 8558). Staff says that the standard of proof has not been met in this case.

[239] Finally, Staff questioned whether an allegation of insider trading can be brought by a private party on an application under section 104 or section 127 of the Act.

2. Analysis and Conclusions

[240] We agree with Staff that it would not be appropriate for us to make any finding that MID, Fair Enterprise or any other person engaged in illegal tipping or insider trading in connection with the Azalea Trust Transaction. Fair Enterprise has limited standing in this proceeding that does not extend to submitting evidence or making submissions with respect to alleged insider trading. In addition, a number of other persons who are not parties to this proceeding had some involvement in the transaction alleged to constitute insider trading and may have an interest in responding to those allegations.

[241] In any event, we do not accept the proposition that if MID or Fair Enterprise had engaged in illegal tipping or insider trading in connection with the Azalea Trust Transaction that would necessarily have prevented MID from relying on either the Downstream Exception or the Market Cap Exemption or have led us to exercise our public interest jurisdiction against MID. Insider trading and compliance with MI 61-101 are two quite separate regulatory issues. Insider trading is a serious enforcement matter that, in our view, should be addressed separately and should not generally form the basis for an application by a person other than Staff pursuant to section 127.

[242] Because the allegations of insider trading have been made, however, we believe that it is only fair to add that the communication of material undisclosed information by Fair Enterprise to Azalea Trust and Mr. Jones appears to us to have been in the necessary course of business in order to effect the Azalea Trust Transaction and thereby facilitate the November Transactions. There is nothing improper in that communication in the circumstances described to us. Fair Enterprise did not, through its knowledge of the November Transactions, exercise any unfair informational advantage over Azalea Trust in carrying out the Azalea Trust Transaction. That is because the parties to that transaction had knowledge of the same material undisclosed information when that transaction was entered into (see subsection 175(5) of the regulation to the Act which reflects this principle). There is no suggestion that Fair Enterprise, Azalea Trust or Mr. Jones, while in possession of material undisclosed information, traded in securities of MEC with any third party. Accordingly, in our view, based on the limited evidence and submissions before us, the Applicants have not made out a *prima facie* case of illegal tipping or insider trading in connection with the Azalea Trust Transaction.

[243] We do not consider the provisions of MID's corporate trading policy and the alleged breach of the trading blackout provisions, to be relevant to the determination of whether the November Transactions were exempt from Minority Approval under MI 61-101.

J. Final Considerations

[244] MEC found itself in severe financial difficulties in the Fall of 2008 and MEC ultimately filed for bankruptcy protection on March 5, 2009. The November Loan, the Loan Extension, the DIP Financing, the Stalking Horse Bid and the Amended DIP Financing can all be viewed as attempts by MID to preserve and protect the value of its existing investment in MEC represented by its secured loans to MEC. It is unlikely in such circumstances that an issuer such as MEC would have been able to quickly raise financing from anyone other than a controlling shareholder.

[245] In circumstances such as these, a regulatory requirement to obtain Minority Approval for such transactions may not be a realistic or effective mechanism to protect the interests of minority shareholders. We note in this respect that there is an exemption in MI 61-101 from the requirement to obtain Minority Approval, in certain circumstances, where an issuer is insolvent or on the verge of bankruptcy. We did not ultimately base our decision in this matter directly on the fact that MEC was either on the verge of insolvency or in bankruptcy at the relevant times, but we do consider that a relevant consideration in applying the provisions of MI 61-101 and deciding whether to exercise our public interest jurisdiction under section 127 of the Act.

[246] All of the business decisions to enter into the transactions before us were reviewed and recommended by a special committee of disinterested directors of MID and were approved by the board of directors of MID. There is no evidence before us to suggest that the directors of MID did not act appropriately throughout with a view to complying with their fiduciary duties and

their responsibilities to all shareholders. Subsection 6.1(6) of the Companion Policy encourages issuers to constitute a special committee of disinterested directors to review and report on a related party transaction. That section of the Companion Policy states, in part, that "[f]ollowing this practice normally would assist in addressing our interest in maintaining capital markets that operate efficiently, fairly and with integrity". MID followed that practice in this case. The Commission has recognised in the past that a rigorous board and special committee process is a relevant consideration in deciding whether to exercise its public interest jurisdiction (see *Sterling Centrecorp.*, *supra* at paras. 214-215).

[247] The directors of MID faced a number of difficult business decisions in connection with the transactions before us. Whether the business decisions the directors made turn out to be the right ones is not for us, as securities regulators, to speculate on. It is not our role to assess the business or financial merits of the various transactions entered into by MID with MEC or to resolve the conflicting positions of the Applicants and MID with respect to the merits of those transactions. We can only interpret and apply the provisions of our securities regulatory regime to the particular circumstances before us.

VI. CONCLUSIONS

[248] Accordingly, for the reasons discussed above, we came to the following conclusions:

1. We concluded that the Commission does not have the authority under section 104 of the Act to grant the relief requested by the Applicants.

2. We concluded that the Applicants cannot bring the Applications as a matter of right under section 127 of the Act but, in the circumstances, we permitted them to do so.

3. We concluded, on balance, that we would give legal effect to the Azalea Trust Transaction in accordance with its terms. That transaction had the legal effect of transferring the beneficial ownership of, and control or direction over, the Fair Enterprise MEC Shares to the Azalea Trust.

4. As a result, we concluded that, as a matter of the interpretation of the provisions of MI 61-101, MID was entitled, as a legal matter, to rely on the Downstream Exception in respect of the November Transactions, the March Transactions and the Amended DIP Financing.

5. Because Fair Enterprise nonetheless continued to have a direct economic interest in the Fair Enterprise MEC Shares following the Azalea Trust Transaction, we considered whether, as a matter of substance, the Market Cap Exemption was available for the November Transactions and whether the Downstream Exception was available for the March Transactions and the Amended DIP Financing.

6. We concluded that there was a reasonable basis for concluding that the Loan Extension did not constitute a material amendment to the existing loans to which it related and was not therefore a related party transaction for purposes of MI 61-101. In any event, we concluded that, in economic substance, the Loan Extension was not a new loan in the principal amount of the existing loans and should not be viewed as such in determining the availability of the Market Cap Exemption to the November Loan. Accordingly, the Market Cap Exemption was available in respect of the November Loan and the Loan Extension (assuming the latter was a related party transaction).

7. We concluded that the November Reorganization Proposal should not be treated as a connected transaction to the November Loan or the Loan Extension in applying the Market Cap Exemption. We also concluded that there was no breach of the Minority Approval requirement by reason of the November Reorganization Proposal.

8. We concluded that any continuing direct economic interest Fair Enterprise may have had in the Fair Enterprise MEC Shares after the Azalea Trust Transaction ceased to be relevant for purposes of the Downstream Exception upon the Bankruptcy Filings made by MEC on March 5, 2009, when the equity shares of MEC became virtually worthless. Accordingly, we concluded that, as a matter of substance, MID could rely on the Downstream Exception in connection with the March Transactions and the Amended DIP Financing.

9. We concluded that it would not be appropriate for us to make any finding that MID, Fair Enterprise or any other person engaged in illegal tipping or insider trading in connection with the Azalea Trust Transaction. In any event, we concluded that the Applicants have not made out a prima facie case of illegal tipping or insider trading in connection with the Azalea Trust Transaction.

10. As a result, we concluded that no Minority Approval was required under MI 61-101 in connection with any of the November Transactions, the March Transactions or the Amended DIP Financing.

11. We concluded that there were no other grounds that would justify granting the relief requested by the Applicants.

[249] Accordingly, we dismissed the Applications and unconditionally released MID from its undertaking provided to Staff on May 11, 2009 relating to transactions with MEC.

Dated at Toronto this 23rd day of December, 2009.

"James E. A. Turner"

"Paulette L. Kennedy"

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Chapter 4

Cease Trading Orders

4.1.1 Temporary, Permanent & Rescinding Issuer Cease Trading Orders

Company Name	Date of Temporary Order	Date of Hearing	Date of Permanent Order	Date of Lapse/Revoke
The Jenex Corporation	14 Dec 09	24 Dec 09	24 Dec 09	
Turnkey E&P Inc.	17 Dec 09	29 Dec 09	29 Dec 09	
RepeatSeat Ltd.	24 Dec 09	05 Jan 10	05 Jan 10	
Teton Energy Corporation	24 Dec 09	05 Jan 10	05 Jan 10	
Hamilton Park Plaza Limited Partnership	22 May 98	03 June 98	04 June 98	30 Dec 09

4.2.1 Temporary, Permanent & Rescinding Management Cease Trading Orders

Company Name	Date of Order or Temporary Order	Date of Hearing	Date of Permanent Order	Date of Lapse/ Expire	Date of Issuer Temporary Order
Seprotech Systems Incorporated	30 Dec 09	11 Jan 10			

4.2.2 Outstanding Management & Insider Cease Trading Orders

Company Name	Date of Order or Temporary Order	Date of Hearing	Date of ermanent Order	Date of Lapse/ Expire	Date of Issuer Temporary Order
Sprylogics International Corp.	02 June 09	15 June 09	15 June 09		
Coalcorp Mining Inc.	07 Oct 09	19 Oct 09	19 Oct 09		
Garrison International Ltd.	29 Oct 09	10 Nov 09	10 Nov 09		
Toxin Alert Inc.	06 Nov 09	18 Nov 09	18 Nov 09		
Seprotech Systems Incorporated	30 Dec 09	11 Jan 10			

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Chapter 7

Insider Reporting

This chapter is available in the print version of the OSC Bulletin, as well as as in Carswell's internet service SecuritiesScource (see www.carswell.com).

This chapter contains a weekly summary of insider transactions of Ontario reporting issuers in the System for Electronic Disclosure by Insiders (SEDI). The weekly summary contains insider transactions reported during the seven days ending Sunday at 11:59 pm.

To obtain Insider Reporting information, please visit the SEDI website (www.sedi.ca).

Chapter 8

Notice of Exempt Financings

Publisher's Note: Due to the holiday schedule, this week's Chapter 8 covers the period between December 21, 2009 and January 5, 2010.

REPORTS OF TRADES SUBMITTED ON FORMS 45-106F1 AND 45-501F1

Transaction Date	No. of Purchasers	Issuer/Security	Total Purchase Price ($)	No. of Securities Distributed
11/25/2009 to 11/26/2009	4	2224164 Ontario Inc. - Units	5,800,000.00	6,000,000.00
11/20/2009	65	AeorMicanical Services Ltd. - Units	8,000,000.00	N/A
12/14/2009	10	Africa West Minerals Corp. - Units	99,900.00	1,665,000.00
11/20/2009	9	Altek Power Corporation - Units	143,000.00	9,533,331.00
11/25/2009	2	Archipelago Learning, Inc. - Common Shares	346,600.00	7,187,500.00
12/17/2009	7	Augen Gold Corp. - Units	715,000.00	1,715,000.00
12/10/2009	1	Axela Inc. - Debentures	125,000.00	1.00
12/22/2009	5	AZCAN RPG Corp. - Notes	45,000.00	180.00
12/22/2009	2	AZCAN RPG Corp. - Preferred Shares	30,000.00	30,000.00
12/22/2009	179	AZCAN RPG Corp. - Units	1,272,000.00	1,272.00
12/22/2009	14	AZCAN RPG Corp. - Units	386,100.00	429.00
12/09/2009	126	BIOX Corporation - Receipts	46,661,000.00	23,475,000.00
10/22/2009	129	Blackbird Investments Inc. - Units	2,438,741.25	9,754,965.00
12/11/2009	58	Blackdog Resources Ltd. - Common Shares	1,556,374.80	1,002,428.00
12/11/2009	1	BTI Systems Inc. - Debenture	85,326.93	1.00
12/16/2009	33	Calfrac Holdings LP - Notes	106,000,000.00	N/A
12/15/2009	33	Canadian Continental Exporation Corp. - Common Shares	2,250,000.00	4,500,000.00
12/01/2009	1	Capital Direct 1 Income Trust - Trust Units	25,000.00	2,500.00
11/11/2009	52	Carbon Friendly Solutions Inc. - Units	1,097,550.00	4,065,000.00
09/30/2009 to 12/03/2009	62	Carbon Friendly Solutions Inc. - Units	886,140.00	1,882,000.00
12/23/2009	12	CBC Monetization Trust - Notes	135,700,000.00	5.00
12/11/2009	81	CBR Gold Corp. - Units	2,282,000.00	4,597,000.00
11/12/2009	7	Century Mining Corporation - Flow-Through Shares	2,700,000.00	13,500,000.00

Transaction Date	No. of Purchasers	Issuer/Security	Total Purchase Price ($)	No. of Securities Distributed
12/13/2009	6	Creso Resources Inc. - Common Shares	222,000.00	1,480,000.00
11/23/2009 to 11/26/2009	6	Creso Resources Inc. - Common Shares	48,750.00	325,000.00
12/08/2009 to 12/26/2009	4	Creso Resources Inc. - Common Shares	765,000.00	5,100,000.00
12/22/2009	1	Dossierview Inc. - Common Shares	750,000.00	1,791,942.00
11/30/2009 to 12/04/2009	5	Eagle Landing Retail Limited Partnership - Limited Partnership Units	655,000.00	655,000.00
12/09/2009	18	Ecu Silver Mining Inc. - Special Warrants	12,237,120.00	16,946,000.00
12/21/2009	2	Edgeworth Mortgage Investment Corporation - Preferred Shares	100,000.00	10,000.00
11/20/2009	66	El Nino Ventures Inc. - Units	1,500,000.00	N/A
11/30/2009	27	Encanto Potash Corp. - Units	1,000,001.10	4,761,910.00
12/14/2009	7	Essar Steel Algoma Inc. - Notes	36,545,850.00	N/A
12/22/2009	46	FCI Energy Opportunities (Cdn) L.P. - Limited Partnership Units	16,150,000.00	16,150.00
11/30/2009	5	First Gold Exploration Inc. - Units	62,400.00	N/A
12/09/2009	1	First Leaside Expansion Limited Partnership - Units	50,000.00	50,000.00
12/09/2009 to 12/14/2009	4	First Leaside Fund - Trust Units	276,603.00	276,603.00
12/11/2009 to 12/15/2009	6	First Leaside Fund - Trust Units	183,019.00	150,000.00
12/14/2009	2	First Leaside Fund - Trust Units	317,790.00	300,000.00
12/09/2009 to 12/10/2009	2	First Leaside Premier Limited Partnership - Units	644,065.84	139,798.00
12/09/2009 to 12/14/2009	6	First Leaside Progressive Limited Partnership - Units	1,579,187.00	1,579,187.00
12/09/2009	1	First Leaside Wealth Management Inc. - Preferred Shares	100,000.00	100,000.00
11/27/2009	153	FT Capital Investment Fund - Units	2,468,000.00	4,936.00
10/15/2009	95	G4G Resources Ltd. - Units	1,985,000.00	7,940,000.00
12/14/2009	1	Gartmore Group Limited - Common Shares	569,217.00	150,000.00
12/16/2008 to 09/29/2009	3	GE Institutional Core Value Equity Fund Investment Class - Units	1,787,588.35	192,309.81
10/01/2008 to 09/30/2009	2	GE Institutional International Equity Fund Investment Class - Units	20,420,845.72	N/A
10/30/2009 to 11/18/2009	2	Georgian Partners Growth Fund (Founders) I L.P. - Limited Partnership Interest	300,000.00	N/A
12/15/2009	7	Grizzly Diamonds Ltd. - Units	280,000.00	700,000.00

Transaction Date	No. of Purchasers	Issuer/Security	Total Purchase Price ($)	No. of Securities Distributed
12/01/2009	47	Hemisphere Energy Corporation - Units	785,000.00	3,925,000.00
11/28/2008 to 10/20/2009	32	Hillsdale Canadian Long/Short Equity Fund - Units	6,117,324.20	119,946.33
12/01/2008 to 11/17/2009	83	Hillsdale Canadian Performance Equity Fund - Units	57,162,807.16	N/A
02/12/2009 to 11/20/2009	18	Hillsdale Global Long/Short Equity Fund - Units	2,493,372.39	292,945.57
12/12/2008 to 11/17/2009	5	Hillsdale Market Neutral Equity Fund - Units	3,251,246.68	234,721.61
12/09/2008	1	Hillsdale Suite - Units	150,000.00	19,116.07
12/12/2008 to 11/20/2009	29	Hillsdale US Performance Equity Fund - Units	12,187,645.58	N/A
12/16/2009	14	Hospital for Sick Children, The - Debentures	200,000,000.00	200,000.00
12/17/2009	2	Hudson River Minerals Inc. - Units	600,000.00	9,600,000.00
12/17/2009	2	Hudson River Minerals Inc. - Units	67,000.00	1,340,000.00
12/10/2009 to 12/11/2009	109	Huron Energy Corporation - Common Shares	2,403,070.00	1,201,535.00
11/26/2009 to 11/30/2009	64	IGW Real Estate Investment Trust - Trust Units	2,858,945.41	2,866,363.67
12/21/2009	86	ING Groep N.V. - Common Shares	79,302,540.00	1,768,412,544.00
11/12/2009	2	Intuitive Exploration Inc. - Common Shares	16,500.00	170,000.00
12/16/2009	7	Invincible Resources Corp. - Common Shares	3,522,910.00	22,156,668.00
11/26/2009 to 11/30/2009	12	IVW Residential Capital Limited Partnership - Limited Partnership Units	393,382.57	248,283.57
11/16/2009	1	Kalahari Resources Inc. - Common Shares	750,000.00	15,000,000.00
12/16/2009	2	KAR Auction Services, Inc. - Common Shares	23,177,500.00	1,825,000.00
12/15/2009	10	King's Bay Gold Corporation - Units	1,000,000.00	12,500,000.00
11/12/2009 to 11/25/2009	3	KmX Corp. - Debentures	131,375.00	N/A
12/14/2009	6	Knick Exploration inc. - Common Shares	422,100.00	1,407,000.00
12/16/2009	4	Knick Exploration inc. - Common Shares	700,000.00	2,000,000.00
11/16/2009	74	Landen Capital Corp. - Units	862,000.00	8,620,000.00
11/24/2009	3	LaSalle Canadian Income & Growth Fund III Limited Partnership - Limited Partnership Units	47,500,000.00	N/A
12/10/2009	114	Magor Communications Corp. - Debentures	7,651,080.70	N/A
11/30/2009	49	Mandalay Resources Corporation - Units	6,100,000.00	24,400,000.00
12/15/2009	2	Manitou Gold Inc. - Common Shares	0.00	50,000.00

Transaction Date	No. of Purchasers	Issuer/Security	Total Purchase Price ($)	No. of Securities Distributed
11/27/2009	21	McConachie Development Limited Partnership - Units	1,397,810.00	139,781.00
11/20/2009	33	McConachie Development Limited Partnership - Units	1,456,700.00	145,670.00
11/27/2009	23	McConnachie Development Investment Corporation - Units	449,810.00	44,981.00
11/20/2009	18	McConnachie Development Investment Corporation - Units	497,700.00	49,770.00
12/14/2009	7	Mitsubishi UFJ Financial Group, Inc. - Common Shares	142,050,128.00	27,680,000.00
11/30/2009	24	Napier Ventures Inc. - Common Shares	500,000.00	5,000,000.00
12/18/2009	17	Navasota Resources Ltd. - Common Shares	2,999,999.70	19,999,998.00
12/16/2009	43	Nelson Financial Group Ltd. - Note	2,490,009.33	1.00
11/24/2009	21	Nevada Exploration Inc. - Units	466,140.00	N/A
12/11/2009	3	New York community Bancorp, Inc. - Common Shares	14,872,754.00	1,079,300.00
12/07/2009 to 12/16/2009	47	Newport Canadian Equity Fund - Units	2,413,181.70	19,802.55
12/07/2009 to 12/16/2009	10	Newport Fixed Income Fund - Units	699,079.65	6,517.53
12/11/2009	2	Newport Global Equity Fund - Units	202,056.28	3,491.98
12/07/2009 to 12/16/2009	16	Newport Yield Fund - Units	526,100.00	4,823.31
12/15/2009	1	Nexxus Lighting Inc. - Common Shares	477,900.00	150,000.00
12/09/2009	2	Nippon Yusen Kabushiki Kaisha - Common Shares	3,336,817.00	1,100,000.00
12/01/2009	9	North American Financial Group Inc. - Debt	535,600.00	N/A
12/10/2009	79	Novus Gold Corp. - Units	2,650,000.00	13,250,000.00
12/14/2009	29	Orion Oil & Gas Ltd. - Common Shares	135,000.00	135,000.00
11/26/2009	37	Pacific Iron Ore Corporation - Flow-Through Shares	3,505,875.00	N/A
12/15/2009	5	PCD Stores (Group) Limited - Common Shares	3,240,000.00	12,000,000.00
11/30/2009	9	PFC 2019 Pacific Financial Corp. - Units	551,000.00	N/A
12/04/2009	319	Pinetree Capital Investment Corp. - Preferred Shares	319,000.00	31,900.00
12/15/2009	1	Rama Drive Realty LLC - Units	106,044.00	20.00
11/26/2009	2	Range Royalty Trust - Trust Units	481,250.00	38,500.00
12/17/2009	23	Redcliffe Exploration Inc. - Flow-Through Shares	3,034,000.00	8,200,000.00

Transaction Date	No. of Purchasers	Issuer/Security	Total Purchase Price ($)	No. of Securities Distributed
07/14/2009	69	Redzone Resources Ltd. - Units	2,000,100.00	5,000,250.00
12/22/2009	6	Reliable Energy Ltd - Common Shares	4,020,500.00	9,350,000.00
12/17/2009	4	Richmond Minerals Inc. - Flow-Through Units	485,000.00	9,000,000.00
11/26/2009 to 12/02/2009	21	Rick Rock Resources Inc. - Common Shares	117,000.00	585,000.00
12/18/2009	31	SA Resources Inc. - Common Shares	6,000,000.00	8,000,000.00
12/09/2009	1	SandRidge Energy, Inc. - Notes	2,075,557.30	2,000.00
11/16/2009	1	Serabi Mining plc - Common Shares	0.00	501,178.00
12/04/2009	112	SGX Resources Inc. - Units	3,985,953.33	1,449,440.00
12/16/2009	3	Sigma Dek Ltd. - Common Shares	545,552.00	215,184.00
12/22/2009	5	Sirios Resources Inc. - Units	1,000,000.00	11,111,111.00
11/30/2009	1	SNS Silver Corp. - Common Shares	40,000.00	400,000.00
12/22/2009	39	Solara Exploration Ltd. - Flow-Through Shares	550,000.00	5,500,000.00
11/13/2009	27	Strategic Oil & Gas Ltd. - Flow-Through Shares	11,493,100.00	3,637,000.00
11/24/2009	2	Tenneco Inc. - Common Shares	507,592.80	13,800,000.00
12/03/2009	24	Trafina Energy Ltd. - Units	2,458,000.10	5,026,670.00
12/22/2009	1	Tyromer Inc. - Common Shares	750,000.00	230,490.00
11/26/2009	9	UBS AG, London Branch - Certificate	926,291.20	1,010.00
11/27/2009	15	Walton AZ Monte Verde Investment Corporation - Common Shares	344,920.00	34,492.00
11/27/2009	16	Walton AZ Verona Investment Corporation - Common Shares	408,510.00	40,851.00
11/20/2009	22	Walton AZ Vista Del Monte 2 Investment Corporation - Common Shares	447,420.00	44,742.00
11/20/2009	22	Walton AZ Vista Del Monte Limited Partnership 2 - Limited Partnership Units	1,092,053.16	102,348.00
11/27/2009	32	Walton TX Austin land Investment Corporation - Common Shares	734,820.00	73,482.00
11/20/2009	35	Walton TX Austin Land Investment corporation - Common Shares	675,930.00	67,593.00
11/20/2009	18	Walton TX Cornerstone Investment Corporation - Common Shares	225,520.00	22,552.00
11/20/2009	32	Walton TX Garland Heights 1 Investment Corporation - Common Shares	535,870.00	53,587.00
12/11/2009 to 12/15/2009	5	Wimberly Apartments Limited Partnership - Units	310,797.17	419,057.00
12/17/2009	17	Xtra-Gold Resources Corp. - Units	514,670.00	706,000.00

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Chapter 9

Legislation

9.1.1 Bill 218, Ontario Tax Plan For More Jobs And Growth Act, 2009

BILL 218
ONTARIO TAX PLAN FOR MORE JOBS AND GROWTH ACT, 2009

Schedules C and S of the *Ontario Tax Plan For More Jobs And Growth Act, 2009* (Bill 218) contain amendments to the *Commodity Futures Act* and the *Securities Act*. Bill 218 received Royal Assent on December 15, 2009 and these amendments came into force on the same date. These Schedules may be viewed on the Ontario Legislative Assembly's website at www.ontla.on.ca. In addition, consolidated versions of the *Securities Act* and the *Commodity Futures Act* reflecting these amendments are expected to be available shortly on the Ontario e-laws site at www.e-laws.gov.on.ca.

The Explanatory Notes in Bill 218 provide details on these amendments. The relevant extracts of the Explanatory Notes are reproduced below.

Explanatory Notes

SCHEDULE C
COMMODITY FUTURES ACT

The enactment of paragraph 1.1 of subsection 65 (1) of the *Commodity Futures Act* gives the Ontario Securities Commission the same authority it has under the *Securities Act* to make rules prescribing circumstances in which a suspended registration is or may be reinstated.

SCHEDULE S
SECURITIES ACT

Part II of the *Securities Act*, which continued the Financial Disclosure Advisory Board, is repealed.

Subsections 3 (2) and (5) of the Act currently authorize the Ontario Securities Commission to have a maximum of 14 members and two Vice-Chairs. The amendments to those subsections permit a maximum of 15 members and three Vice-Chairs.

The re-enactment of subsection 29 (3) of the Act expands the types of situations in which a representative's registration with respect to a registrant is automatically suspended under the Act to include situations in which the representative has lost his or her authority to act in a capacity in which he or she must be registered under the Act by reason of changes in employment functions or changes to or the termination of a partnership or agency relationship with the registrant.

The re-enactment of subsection 29 (6) of the Act delays the revocation of registration of a registrant after an automatic suspension of registration under the Act until any proceeding against the registrant under the rules of a self-regulatory organization has been completed.

The re-enactment of paragraph 3 of section 31 of the Act extends the right to a hearing to persons and companies whose registration is suspended automatically under the Act.

Sections 90 and 91 of the Act contain provisions that deem an offeror to have beneficial ownership of securities and that deem a person or company to be acting jointly or in concert with an offeror. The amendments to section 102 of the Act extend the application of those provisions to acquirors for the purposes of the "early warning" provisions in sections 102.1 and 102.2 of the Act.

Sections 138.8 and 138.9 of the Act are amended to require applicants and appellants to provide notice to the Ontario Securities Commission of court dates for leave applications, trials and appeals and to require the parties to provide copies of relevant factums to the Commission.

Section 138.12 of the Act is re-enacted to authorize the Ontario Securities Commission to intervene in any appeal of a decision relating to an application for leave under section 138.8 of the Act and in any appeal of the decision in an action under section 138.3 of the Act.

The amendment to clause 143 (2) (a.0.1) of the Act corrects the French wording of the clause.

9.1.2 Bill 212, Good Government Act, 2009

Schedule 16 of the *Good Government Act, 2009* (Bill 212) contains amendments to the *Commodity Futures Act*. Bill 212 received Royal Assent on December 15, 2009 and these amendments came into force on the same date. This Schedule may be viewed on the Ontario Legislative Assembly's website at www.ontla.on.ca. In addition, a consolidated version of the *Commodity Futures Act* reflecting these amendments is expected to be available shortly on the Ontario e-laws site at www.e-laws.gov.on.ca.

The Explanatory Notes in Bill 212 provides details on these amendments. The relevant extract of the Explanatory Notes is reproduced below.

Explanatory Notes

Commodity Futures Act

Section 2.2 of the Act lists the extraordinary circumstances in which the Ontario Securities Commission must notify the Minister of Finance that immediate action must be taken in the public interest. The reference to "disruption" in the English version is changed to "major disruption" for consistency within the section.

The reference to the Treasurer of Ontario in section 61 of the Act is updated to Minister of Finance.

A cross reference to provisions in the *Proceedings Against the Crown Act* is corrected in subsection 64 (3) of the Act.

The amendment to subparagraph 28 i of subsection 65 (1) of the Act corrects a reference to a Part in the Act.

Chapter 11

IPOs, New Issues and Secondary Financings

Issuer Name:
AAER Inc.
Principal Regulator - Quebec
Type and Date:
Preliminary Short Form Prospectus dated December 29, 2009
NP 11-202 Receipt dated December 30, 2009
Offering Price and Description:
Minimum Offering: $5,000,000.00 or * Offered Units; Maximum Offering: $6,500,000.00 or * Offered Units and Issuance of a Maximum of * Payment Units in Settlement of Certain Outstanding Debts Price: $ * per Unit
Underwriter(s) or Distributor(s):
Canaccord Financial Ltd.
Promoter(s):
-
Project #1520191

Issuer Name:
Aquarius Capital Corp.
Principal Regulator - Ontario
Type and Date:
Amended and Restated Preliminary CPC Prospectus dated December 22, 2009
NP 11-202 Receipt dated December 22, 2009
Offering Price and Description:
$200,000.00 to $400,000.00 - 2,000,000 to 4,000,000 Common Shares Price: $0.10 per Common Share
Underwriter(s) or Distributor(s):
Northern Securities Inc.
Promoter(s):
-
Project #1445400

Issuer Name:
Blue Ribbon Income Fund
Principal Regulator - Ontario
Type and Date:
Preliminary Long Form Prospectus dated December 22, 2009
NP 11-202 Receipt dated December 24, 2009
Offering Price and Description:
Warrants to Subscribe for up to * Units at a Subscription Price of $ * per Unit
Underwriter(s) or Distributor(s):
-
Promoter(s):
Blue Ribbon Fund Management Ltd.
Project #1519313

Issuer Name:
Build America Investment Grade Bond Fund
Principal Regulator - Ontario
Type and Date:
Preliminary Long Form Prospectus dated December 22, 2009
NP 11-202 Receipt dated December 22, 2009
Offering Price and Description:
$ * - * Class A and F Units - Price: $25.00 per Class A and F Unit
Underwriter(s) or Distributor(s):
BMO Nesbitt Burns Inc.
CIBC World Markets Inc.
RBC Dominion Securities Inc.
Scotia Capital Inc.
HSBC Securities (Canada) Inc.
National Bank Financial Inc.
TD Securities Inc.
GMP Securities L.P.
Blackmont Capital Inc.
Canaccord Financial Ltd.
Dundee Securities Corporation
Raymond James Ltd.
Desjardins Securities Inc.
Research Capital Corporation
Wellington West Capital Markets Inc.
Promoter(s):
Connor, Clark & Lunn Capital Markets Inc.
Project #1518293

Issuer Name:
Canadian Capital Auto Receivables Asset Trust III
Principal Regulator - Ontario
Type and Date:
Preliminary Short Form Prospectus dated December 23, 2009
NP 11-202 Receipt dated December 24, 2009
Offering Price and Description:
$ * - * % Auto Loan Receivables-Backed Notes, Series 2010-1 - Price: $1000 per principal amount of notes
Underwriter(s) or Distributor(s):
Scotia Capital Inc.
Promoter(s):
General Motors Acceptance Corporation of Canada, Limited
Project #1519374

Issuer Name:
Canadian High Income Equity Fund
Principal Regulator - Ontario
Type and Date:
Preliminary Long Form Prospectus dated December 18, 2009
NP 11-202 Receipt dated December 21, 2009
Offering Price and Description:
Maximum $ * - * Combined Units - Price: $12.00 per Combined Unit (Each Combined Unit consists of one Unit and one Warrant to purchase one Unit)
Underwriter(s) or Distributor(s):
CIBC World Markets Inc.
RBC Dominion Securities Inc.
BMO Nesbitt Burns Inc.
National Bank Financial Inc.
Scotia Capital Inc.
TD Securities Inc.
Canaccord Financial Ltd.
HSBC Securities (Canada) Inc.
Raymond James Ltd.
Desjardins Securities Inc.
Dundee Securities Corporation
Manulife Securities Incorporated
Research Capital Corporation
Blackmont Capital Inc.
Wellington West Capital Markets Inc.
Promoter(s):
Brompton Funds Management Limited
Project #1517208

Issuer Name:
Cominar Real Estate Investment Trust
Principal Regulator - Quebec
Type and Date:
Preliminary Short Form Prospectus dated December 23, 2009
NP 11-202 Receipt dated December 23, 2009
Offering Price and Description:
75,000,000 -Series E 5.75% Convertible Unsecured Subordinated Debentures - Price: $1,000 per $1,000 principal amount of Debentures
Underwriter(s) or Distributor(s):
National Bank Financial Inc.
BMO Nesbitt Burns Inc.
RBC Dominion Securities Inc.
Desjardins Securities Inc.
CIBC World Markets Inc.
Scotia Capital Inc.
Canaccord Financial Ltd.
Blackmont Capital Inc.
Genuity Capital Markets G.P.
Promoter(s):
-
Project #1518715

Issuer Name:
Counsel Short Term Bond
Principal Regulator - Ontario
Type and Date:
Preliminary Simplified Prospectus dated December 18, 2009
NP 11-202 Receipt dated December 21, 2009
Offering Price and Description:
Series A, D, E, F and I Units
Underwriter(s) or Distributor(s):
-
Promoter(s):
Counsel Portfolio Services Inc.
Project #1517251

Issuer Name:
Emerge Oil & Gas Inc.
Principal Regulator - Alberta
Type and Date:
Preliminary Long Form Prospectus dated December 22, 2009
NP 11-202 Receipt dated December 22, 2009
Offering Price and Description:
$65,550,000.00 - 32,775,000 Common Shares issuable on exercise of Outstanding Special Warrants - Price: $2.00 per Subscription Receipt
Underwriter(s) or Distributor(s):
FirstEnergy Capital Corp.
Promoter(s):
-
Project #1518478

Issuer Name:
Front Street Flow-Through 2010-I Limited Partnership
Principal Regulator - Ontario
Type and Date:
Preliminary Long Form Prospectus dated December 16, 2009
NP 11-202 Receipt dated December 22, 2009
Offering Price and Description:
(Maximum Offering $150,000,000.00 - 6,000,000 Units) - Price: $25.00 per Unit - MINIMUM PURCHASE: 200 Units
Underwriter(s) or Distributor(s):
National Bank Financial Inc.
CIBC World Markets Inc.
BMO Nesbitt Burns Inc.
RBC Dominion Securities Inc.
Scotia Capital Inc.
TD Securities Inc.
Canaccord Financial Ltd.
Manulife Securities Inc.
Tuscarora Capital Inc.
Blackmont Capital Inc.
Dundee Securities Corporation
GMP Securities L.P.
HSBC Securities (Canada) Inc.
Raymond James Ltd.
Wellington West Capital Markets Inc.
Promoter(s):
Front Street Capital 2004
Project #1517830

Issuer Name:
HSBC Bank Canada
Principal Regulator - British Columbia
Type and Date:
Preliminary Base Shelf Prospectus dated December 30, 2009
NP 11-202 Receipt dated December 30, 2009
Offering Price and Description:
$500,000,000.00 - Notes linked to the price, value or level of indices, equities, debt instruments, commodities, interest rates, foreign exchange rates and/or other measures or items
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #1520510

Issuer Name:
ISE Limited
Principal Regulator - Ontario
Type and Date:
Preliminary Long Form Prospectus dated December 18, 2009
NP 11-202 Receipt dated December 21, 2009
Offering Price and Description:
$ * - * Common Shares - Price: $ * per Common Share
Underwriter(s) or Distributor(s):
Raymond James Ltd.
RBC Dominion Securities Inc.
Promoter(s):
-
Project #1517499

Issuer Name:
MRF 2010 Resource Limited Partnership
Principal Regulator - Alberta
Type and Date:
Preliminary Long Form Prospectus dated December 30, 2009
NP 11-202 Receipt dated December 30, 2009
Offering Price and Description:
$100,000,000.00 (maximum) - (maximum – 4,000,000 Units) $5,000,000.00 (minimum) - (minimum – 200,000 Units) PRICE: $25.00 PER UNIT; MINIMUM SUBSCRIPTION: $2,500 (One Hundred Units)
Underwriter(s) or Distributor(s):
CIBC World Markets Inc.
RBC Dominion Securities Inc.
BMO Nesbitt Burns Inc.
National Bank Financial Inc.
Scotia Capital Inc.
TD Securities Inc.
Canaccord Capital Inc.
Dundee Securities Corporation
HSBC Securities (Canada) Inc.
Manulife Securities Incorporated
Middlefield Capital Corporation
Raymond James Ltd.
Blackmont Capital Inc.
GMP Securities L.P.
Wellington West Capital Markets Inc.
Promoter(s):
Middlefield Limited
Middlefield Group Limited
Project #1520368

Issuer Name:
NCE Diversified Flow-Through (10) Limited Partnership
Principal Regulator - Ontario
Type and Date:
Preliminary Long Form Prospectus dated December 23, 2009
NP 11-202 Receipt dated December 23, 2009
Offering Price and Description:
$ * (Maximum Offering) - $5,000,000.00 -(Minimum Offering) - A maximum of * and a minimum of 200,000 Limited Partnership Units - Subscription Price: $25 per Unit - Minimum Subscription: 200 Units
Underwriter(s) or Distributor(s):
RBC Dominion Securities Inc.
CIBC World Market Inc.
BMO Nesbitt Burns Inc.
National Bank Financial Inc.
TD Securities Inc.
HSBC Securities (Canada) Inc.
Scotia Capital Inc.
Canaccord Financial Ltd.
Dundee Securities Corporation
Raymond James Ltd.
Blackmont Capital Inc.
Manulife Securities Incorporated
Burgeonvest Bick Securities Limited
Desjardins Securities Inc.
Industrial Alliance Securities Inc.
Jory Capital Inc.
Laurentian Bank Securities Inc.
M Partners Inc.
Research Capital Corporation
Wellington West Capital Markets Inc.
Promoter(s):
Petro Assets Inc.
Project #1518972

Issuer Name:
Pacific Orient Capital Inc.
Principal Regulator - Ontario
Type and Date:
Preliminary CPC Prospectus dated December 22, 2009
NP 11-202 Receipt dated December 23, 2009
Offering Price and Description:
$200,000.00 -1,000,000 Common Shares Price: $0.20 per Common Share
Underwriter(s) or Distributor(s):
Research Capital Corporation
Promoter(s):
Francis Mak
Project #1518451

Issuer Name:
Pathway Mining 2010 Flow-Through Limited Partnership
Principal Regulator - Ontario
Type and Date:
Preliminary Long Form Prospectus dated December 18, 2009
NP 11-202 Receipt dated December 23, 2009
Offering Price and Description:
$20,000,000.00 (Maximum Offering) -$5,000,000.00 (Minimum Offering) and A Maximum of 2,000,000 and a Minimum of 500,000 Limited Partnership Units Minimum Subscription: 250 Limited Partnership Units Subscription Price:$10.00 per Limited Partnership Unit
Underwriter(s) or Distributor(s):
Wellington West Capital Inc.
HSBC Securities (Canada) Inc.
BMO Nesbitt Burns Inc.
Burgeonvest Bick Securities Limited
Canaccord Financial Ltd
Raymond James Ltd.
Blackmont Capital Corporation
Dundee Securities Corporation
M Partners Inc.
Research Capital Corporation
Integral Wealth Securities Limited
Argosy Securities Inc.
Promoter(s):
Pathway Mining 2009-II Inc.
Project #1518529

Issuer Name:
PERSEUS MINING LIMITED
Principal Regulator - British Columbia
Type and Date:
Preliminary Long Form Prospectus dated December 23, 2009
NP 11-202 Receipt dated December 24, 2009
Offering Price and Description:
$34,164,000.00 - 23,400,000 Ordinary Shares issuable on Conversion of 23,400,000 Subscription Receipts
Price: $1.46 per Subscription Receipt
Underwriter(s) or Distributor(s):
Cormark Securities Inc.
Clarus Securities Inc.
Dundee Securities Corporation
BMO Nesbitt Burns Inc.
CIBC World Markets Inc.
GMP Securities LP
Promoter(s):
-
Project #1519387

Issuer Name:
SMC Man AHL Alpha Fund
Principal Regulator - Ontario
Type and Date:
Preliminary Long Form Prospectus dated December 23, 2009
NP 11-202 Receipt dated December 23, 2009
Offering Price and Description:
Maximum $* - * Class A Units and Class F Units Price: $10.00 per Unit Minimum Purchase: $5,000 (500 Units)
Underwriter(s) or Distributor(s):
Scotia Capital Inc.
Promoter(s):
Scotia Capital Inc.
Project #1518995

Issuer Name:
Sprott 2010 Flow-Through Limited Partnership
Principal Regulator - Ontario
Type and Date:
Preliminary Long Form Prospectus dated December 18, 2009
NP 11-202 Receipt dated December 22, 2009
Offering Price and Description:
$100,000,000.00 (maximum) 4,000,000 Limited Partnership Units - Price per Unit: $25 Minimum Subscription: $5,000 (200 Units)
Underwriter(s) or Distributor(s):
RBC Dominion Securities Inc.
TD Securities Inc.
CIBC World Markets Inc.
BMO Nesbitt Burns Inc.
National Bank Financial Inc.
Dundee Securities Corporation
Scotia Capital Inc.
Canaccord Financial Inc.
GMP Securities L.P.
HSBC Securities (Canada) Inc.
Blackmont Capital Inc.
Desjardins Securities Inc.
Manulife Securities Incorporated
Wellington West Capital Markets Inc.
Promoter(s):
Sprott 2010 Corporation
Sprott Asset Management GP Inc.
Project #1517715

Issuer Name:
Victoria Gold Corp. (formerly Victoria Resource Corporation)
Principal Regulator - Ontario
Type and Date:
Preliminary Short Form Prospectus dated December 24, 2009
NP 11-202 Receipt dated December 29, 2009
Offering Price and Description:
$14,999,999.00 - 23,809,522 Common Shares issuable upon exercise of 23,809,522 Outstanding Special Warrants Price: $0.63 per Special Warrant
Underwriter(s) or Distributor(s):
Raymond James Ltd.
Wellington West Capital Markets Inc.
Desjardins Securities Inc.
Blackmont Capital Inc.
GMP Securities L.P.
Sandfire Securities Inc.
Promoter(s):
-
Project #1519709

Issuer Name:
Walton Ontario Land L.P. 1
Principal Regulator - Alberta
Type and Date:
Preliminary Long Form Prospectus dated December 21, 2009
NP 11-202 Receipt dated December 21, 2009
Offering Price and Description:
Maximum: $35,800,000.00 (3,580,000 Units) - Minimum: $* □□*Units)
Underwriter(s) or Distributor(s):
RBC Dominion Securities Inc.
BMO Nesbitt Burns Inc.
HSBC Securities (Canada) Inc.
Canaccord Financial Ltd.
Raymond James Ltd.
Desjardins Securities Inc.
Dundee Securities Corporation
Research Capital Corporation
Blackmont Capital Inc.
Integral Wealth Securities Limited
Promoter(s):
Walton International Group Inc.
Project #1517721

Issuer Name:
WCSB Oil & Gas Royalty Income 2010 Limited Partnership
Principal Regulator - British Columbia
Type and Date:
Preliminary Long Form Prospectus dated December 23, 2009
NP 11-202 Receipt dated December 23, 2009
Offering Price and Description:
Maximum Offering: $25,000,000.00 (250,000 Units);
Minimum Offering: $2,500,000.00 (25,000 Units)
Price: $100 per Unit Minimum Purchase: $5,000 (50 Units)
Underwriter(s) or Distributor(s):
Dundee Securities Corporation
HSBC Securities (Canada) Inc.
Blackmont Capital Inc.
Canaccord Financial Ltd.
Raymond James Ltd.
Wellington West Capital Markets Inc.
GMP Securities L.P.
Manulife Securities Incorporated
Research Capital Corporation
M Partners Inc.
Argosy Securities Inc.
Union Securities Ltd.
Promoter(s):
WCSB Holdings Corp.
CADO Bancorp Ltd.
BrickBurn Asset Management Inc.
Project #1519109

Issuer Name:
Advantage Oil & Gas Ltd.
Principal Regulator - Alberta
Type and Date:
Final Short Form Prospectus dated December 22, 2009
NP 11-202 Receipt dated December 22, 2009
Offering Price and Description:
$75,000,000.00 - 5.00% Convertible Unsecured Subordinated Debentures Due January 30, 2015
Underwriter(s) or Distributor(s):
RBC Dominion Securities Inc.
BMO Nesbitt Burns Inc.
National Bank Financial Inc.
Scotia Capital Inc.
CIBC World Markets Inc.
FirstEnergy Capital Corp.
Thomas Weisel Partners Canada Inc.
HSBC Securities (Canada) Inc.
Macquarie Capital Markets Canada Ltd.
Promoter(s):
-
Project #1515598

Issuer Name:
Ansar Financial and Development Corporation
Type and Date:
Final Long Form Prospectus dated December 24, 2009
Receipted on December 29, 2009
Offering Price and Description:
Minimum Offering: $11,850,000.00; Maximum Offering: $15,000,000.00 - Up to 15,000,000 Common Shares at $1.00 per Common Share
Underwriter(s) or Distributor(s):
-
Promoter(s):
Pervez Nasim
Mohammed Jalaluddin
Project #1460020

Issuer Name:
BMO Global Equity Class (A Class of BMO Global Tax Advantage Funds Inc.)
Principal Regulator - Ontario
Type and Date:
Amendment #6 dated December 16, 2009 to the Simplified Prospectus and Annual Information Form dated May 8, 2009
NP 11-202 Receipt dated December 22, 2009
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
BMO Investments Inc.
Promoter(s):
BMO Investments Inc.
Project #1402935

Issuer Name:
BMO Guardian Monthly Dividend Fund Ltd.
BMO Guardian Canadian Diversified Monthly Income Fund
Principal Regulator - Ontario
Type and Date:
Amendment #4 dated December 16, 2009 to the Simplified Prospectuses and Annual Information Form dated July 8, 2009
NP 11-202 Receipt dated December 22, 2009
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
Guardian Group of Funds Ltd.
Jones Heward Investment Management Inc.
Promoter(s):
-
Project #1433556

Issuer Name:
Brookfield Infrastructure Partners L.P.
Principal Regulator - Ontario
Type and Date:
Final Base Shelf Prospectus dated December 22, 2009
NP 11-202 Receipt dated December 22, 2009
Offering Price and Description:
US$600,000,000.00 - Limited Partnership Units Preferred Limited Partnership Units
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #1513024

Issuer Name:
B.E.S.T. Total Return Fund Inc.
(Class A Shares)
Principal Regulator - Ontario
Type and Date:
Final Long Form Prospectus dated December 18, 2009
NP 11-202 Receipt dated December 22, 2009
Offering Price and Description:
CLASS A SHARES
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #1502859

Issuer Name:
Capricorn Business Acquisitions Inc.
Principal Regulator - Ontario
Type and Date:
Final Prospectus dated December 29, 2009
NP 11-202 Receipt dated December 30, 2009
Offering Price and Description:
Minimum Offering: $200,000.00 or 2,000,000 Common Shares; Maximum Offering: $800,000.00 or 8,000,000 Common Shares Price: $0.10 per Common Share
Underwriter(s) or Distributor(s):
Leede Financial Markets Inc.
Promoter(s):
-
Project #1494548

Issuer Name:
Centerra Gold Inc.
Principal Regulator - Ontario
Type and Date:
Final Short Form Prospectus dated December 21, 2009
NP 11-202 Receipt dated December 21, 2009
Offering Price and Description:
$908,339,338.00 - 88,618,472 Common Shares Price: $10.25 per Common Share
Underwriter(s) or Distributor(s):
CIBC World Markets Inc.
RBC Dominion Securities Inc.
BMO Nesbitt Burns Inc.
Scotia Capital Inc.
HSBC Securities (Canada) Inc.
Morgan Stanley Canada Limited
National Bank Financial Inc.
TD Securities Inc.
UBS Securities Canada Inc.
BNP Paribas (Canada) Inc.
Canaccord Financial Ltd.
Desjardins Securities Inc.
GMP Securities L.P.
Macquarie Capital Markets Canada Ltd.
Salman Partners Inc.
Promoter(s):
-
Project #1514793

Issuer Name:
Cominar Real Estate Investment Trust
Principal Regulator - Quebec
Type and Date:
Final Short Form Prospectus dated January 5, 2010
NP 11-202 Receipt dated January 5, 2010
Offering Price and Description:
$75,000,000.00 - Series E 5.75% Convertible Unsecured Subordinated Debentures
Underwriter(s) or Distributor(s):
National Bank Financial Inc.
BMO Nesbitt Burns Inc.
RBC Dominion Securities Inc.
Desjardins Securities Inc.
CIBC World Markets Inc.
Scotia Capital Inc.
Canaccord Financial Ltd.
Blackmont Capital Inc.
Genuity Capital Markets G.P.
Promoter(s):
-
Project #1518715

Issuer Name:
Dynamic Focus+ Balanced Fund
(Series A, Series F, Series I, Series O and Series T)
Dynamic Focus+ Equity Fund
(Series A, Series F, Series I and Series O)
Dynamic Focus+ Resource Fund
(Series A, Series F, Series I, Series IP, Series O and Series OP)
Dynamic Focus+ Wealth Management Fund
(Series A, Series F, Series I, Series O and Series T)
Dynamic Dividend Fund
(Series A, Series F, Series I, Series O and Series T)
Dynamic Dividend Income Fund
(Series A, Series F, Series I, Series O and Series T)
Dynamic Energy Income Fund (formerly, Dynamic Focus+ Energy Income Trust Fund)
(Series A, Series F, Series I, Series IP, Series O, Series OP and Series T)
Dynamic Equity Income Fund (formerly, Dynamic Focus+ Diversified Income Fund)
(Series A, Series F, Series I, Series O and Series T)
Dynamic Small Business Fund (formerly, Dynamic Focus+ Small Business Fund)
(Series A, Series F, Series I, Series IP, Series O and Series OP)
Dynamic Strategic Yield Fund
(Series A, Series F, Series I and Series O)
Dynamic Advantage Bond Fund (Series A, Series F, Series I and Series O)
Dynamic Canadian Bond Fund (Series A, Series F, Series I and Series O)
Dynamic Dollar-Cost Averaging Fund (Series A)
Dynamic High Yield Bond Fund
(Series A, Series F, Series FP, Series I, Series O, Series OP and Series P)
Dynamic Money Market Fund (Series A and Series F)
Dynamic Real Return Bond Fund (Series A, Series F, Series I and Series O)
Dynamic Short Term Bond Fund (Series A and Series F)
Dynamic Power American Currency Neutral Fund
(Series A, Series F, Series I and Series O)
Dynamic Power American Growth Fund
(Series A, Series F, Series I, Series IP, Series O, Series OP and Series T)
Dynamic Power Balanced Fund
(Series A, Series F, Series I, Series IP, Series O, Series OP and Series T)
Dynamic Power Canadian Growth Fund
(Series A, Series F, Series I, Series IP, Series O, Series OP and Series T)
Dynamic Power Small Cap Fund
(Series A, Series F, Series I and Series O)
Dynamic Diversified Real Asset Fund (Series A, Series F, Series I and Series O)
Dynamic Global Infrastructure Fund (Series A, Series F, Series I, Series O and Series T)
Dynamic Global Real Estate Fund (formerly, Dynamic Focus+ Real Estate Fund)
(Series A, Series F, Series I, Series IP, Series O, Series OP and Series T)
Dynamic Precious Metals Fund (Series A, Series F, Series I and Series O)
Dynamic Strategic All Income Portfolio (Series A)
Dynamic Strategic Growth Portfolio (formerly Dynamic Fund of Funds) (Series A)
Dynamic American Value Fund (Series A, Series F, Series I, Series O and Series T)
Dynamic Canadian Dividend Fund (Series A, Series F, Series I and Series O)
Dynamic Dividend Value Fund
(Series A, Series F, Series I, Series IT, Series O and Series T)
Dynamic European Value Fund (Series A, Series F, Series I and Series O)
Dynamic Far East Value Fund
(Series A, Series F, Series I, Series IP, Series O and Series OP)
Dynamic Global Discovery Fund (Series A, Series F, Series I, Series O and Series T)
Dynamic Global Dividend Value Fund
(Series A, Series F, Series I, Series IT, Series O and Series T)
Dynamic Global Value Balanced Fund (Series A, Series F, Series I, Series O and Series T)
Dynamic Global Value Fund (Series A, Series F, Series I, Series IT, Series O and Series T)
Dynamic Value Balanced Fund (Series A, Series F, Series I, Series O and Series T)
Dynamic Value Fund of Canada (Series A, Series F, Series I, Series O and Series T)
DynamicEdge Balanced Portfolio
(Series A, Series F, Series FT, Series I, Series IT, Series O and Series T)
DynamicEdge Balanced Growth Portfolio
(Series A, Series F, Series FT, Series I, Series IT, Series O and Series T)
DynamicEdge Equity Portfolio
(Series A, Series F, Series FT, Series I, Series IT, Series O and Series T)
DynamicEdge Growth Portfolio
(Series A, Series F, Series FT, Series I, Series IT, Series O and Series T)
Dynamic Dividend Income Class of Dynamic Global Fund Corporation
(Series A, Series F, Series I, Series O and Series T)
Dynamic Strategic Yield Class of Dynamic Global Fund Corporation
(Series A, Series F, Series I and Series T)
Dynamic Advantage Bond Class of Dynamic Global Fund Corporation
(Series A, Series F, Series I and Series T)
Dynamic Money Market Class of Dynamic Global Fund Corporation
(Series C and Series F)
Dynamic Power American Growth Class of Dynamic Global Fund Corporation
(Series A, Series F, Series I, Series IP, Series O, Series OP and Series T)
Dynamic Power Balanced Class of Dynamic Global Fund Corporation
(Series A, Series F, Series I, Series IP, Series O, Series OP and Series T)
Dynamic Power Canadian Growth Class of Dynamic Global Fund Corporation
(Series A, Series F, Series I, Series IP, Series O, Series OP and Series T)

Dynamic Power Global Balanced Class of Dynamic Global Fund Corporation
(Series A, Series F, Series I, Series IP, Series O, Series OP and Series T)
Dynamic Power Global Growth Class of Dynamic Global Fund Corporation
(Series A, Series F, Series I, Series IP, Series O, Series OP and Series T)
Dynamic Power Global Navigator Class of Dynamic Global Fund Corporation
(Series A, Series F, Series I, Series IP, Series O, Series OP and Series T)
Dynamic Canadian Dividend Class of Dynamic Global Fund Corporation
(Series A, Series F, Series I, Series O and Series T)
Dynamic Canadian Value Class of Dynamic Global Fund Corporation
(Series A, Series F, Series I, Series IP, Series O, Series OP and Series T)
Dynamic EAFE Value Class of Dynamic Global Fund Corporation
(Series A, Series F, Series I, Series O and Series T)
Dynamic Global Discovery Class of Dynamic Global Fund Corporation
(Series A, Series F, Series I, Series O and Series T)
Dynamic Global Dividend Value Class of Dynamic Global Fund Corporation
(Series A, Series F, Series I, Series O and Series T)
Dynamic Global Value Class of Dynamic Global Fund Corporation
(Series A, Series F, Series I, Series IP, Series O, Series OP and Series T)
Dynamic Value Balanced Class of Dynamic Global Fund Corporation
(Series A, Series F, Series I, Series O and Series T)
Dynamic Global Energy Class of Dynamic Global Fund Corporation
(Series A, Series F, Series I, Series IP, Series O, Series OP and Series T)
Dynamic Strategic Gold Class of Dynamic Global Fund Corporation
(Series A, Series F, Series I and Series O)
DynamicEdge Balanced Class Portfolio of Dynamic Global Fund Corporation
(Series A, Series F, Series FT, Series I, Series IT, Series O and Series T)
DynamicEdge Balanced Growth Class Portfolio of Dynamic Global Fund Corporation
(Series A, Series F, Series FT, Series I, Series IT, Series O and Series T)
DynamicEdge Equity Class Portfolio of Dynamic Global Fund Corporation
(Series A, Series F, Series FT, Series I, Series IT, Series O and Series T)
DynamicEdge Growth Class Portfolio of Dynamic Global Fund Corporation
(Series A, Series F, Series FT, Series I, Series IT, Series O and Series T)
Dynamic Aurion Canadian Equity Class of Dynamic Global Fund Corporation
(Series A, Series F, Series I, Series O and Series T)
Dynamic Aurion Tactical Balanced Class of Dynamic Global Fund Corporation
(Series A, Series F, Series I, Series O and Series T)
DMP Canadian Dividend Class of Dynamic Global Fund Corporation (Series A and Series F)
DMP Canadian Value Class of Dynamic Global Fund Corporation (Series A and Series F)
DMP Global Value Class of Dynamic Global Fund Corporation (Series A and Series F)
DMP Power Canadian Growth Class of Dynamic Global Fund Corporation (Series A and Series F)
DMP Power Global Growth Class of Dynamic Global Fund Corporation (Series A and Series F)
DMP Resource Class of Dynamic Global Fund Corporation (Series A and Series F)
DMP Value Balanced Class of Dynamic Global Fund Corporation (Series A and Series F)
Principal Regulator - Ontario

Type and Date:
Final Simplified Prospectuses dated December 23, 2009
NP 11-202 Receipt dated December 31, 2009

Offering Price and Description:
Mutual fund securities at net asset value

Underwriter(s) or Distributor(s):
Goodman & Company Investment Counsel Ltd..

Promoter(s):
Goodman & Company Investment Counsel Ltd.

Project #1501539

Issuer Name:
Dundee Real Estate Investment Trust
Principal Regulator - Ontario

Type and Date:
Final Short Form Prospectus dated December 30, 2009
NP 11-202 Receipt dated December 30, 2009

Offering Price and Description:
$90,000,000.00 - 4,800,000 REIT Units, Series A PRICE: $18.75 per Unit

Underwriter(s) or Distributor(s):
TD Securities Inc.
Scotia Capital Inc.
CIBC World Markets Inc.
Dundee Securities Corporation
BMO Nesbitt Burns Inc.
RBC Dominion Securities Inc.
Brookfield Financial Corp.
Desjardins Securities Inc.
Genuity Capital Markets
HSBC Securities (Canada) Inc.
National Bank Financial Inc.
Raymond James Ltd.

Promoter(s):
-

Project #1515372

Issuer Name:
EnerVest Natural Resource Fund Ltd.
Principal Regulator - Alberta
Type and Date:
Final Simplified Prospectus dated December 21, 2009
NP 11-202 Receipt dated December 21, 2009
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #1501127

Issuer Name:
Hilltown Resources Inc.
Principal Regulator - British Columbia
Type and Date:
Final Long Form Prospectus dated December 17, 2009
NP 11-202 Receipt dated December 21, 2009
Offering Price and Description:
$450,000.00 - 4,500,000 SHARES AT A PRICE OF $0.10 PER SHARE
Underwriter(s) or Distributor(s):
Research Capital Corporation
Promoter(s):
Rudy De Jonge
David Eaton
Project #1492203

Issuer Name:
HUSKY ENERGY INC.
Principal Regulator - Alberta
Type and Date:
Final Shelf Prospectus dated December 21, 2009
NP 11-202 Receipt dated December 21, 2009
Offering Price and Description:
$1,000,000,000.00 - Medium Term Notes (Unsecured)
Underwriter(s) or Distributor(s):
RBC Dominion Securities Inc.
HSBC Securities (Canada) Inc.
CIBC World Markets Inc.
BMO Nesbitt Burns Inc.
Scotia Capital Inc.
TD Securities Inc.
Promoter(s):
-
Project #1515026

Issuer Name:
Hydrogenics Corporation
Principal Regulator - Ontario
Type and Date:
Final Base Shelf Prospectus dated December 31, 2009
NP 11-202 Receipt dated January 4, 2010
Offering Price and Description:
US$16,000,000.00:
Common Shares
Preferred Shares
Debt Securities
Subscription Receipts
Warrants
Share Purchase Contracts
Units
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #1495910

Issuer Name:
Jov Prosperity Canadian Equity Fund
Jov Prosperity Canadian Fixed Income Fund
Jov Prosperity International Equity Fund
Jov Prosperity U.S. Equity Fund
Principal Regulator - Ontario
Type and Date:
Final Simplified Prospectuses dated December 29, 2009
NP 11-202 Receipt dated December 30, 2009
Offering Price and Description:
Mutual fund trust units at net asset value
Underwriter(s) or Distributor(s):
-
Promoter(s):
JovFunds Management Inc.,
Project #1511540

Issuer Name:
Mackenzie Universal Gold Bullion Class
Principal Regulator - Ontario
Type and Date:
Final Simplified Prospectus dated December 21, 2009
NP 11-202 Receipt dated December 22, 2009
Offering Price and Description:
Series A, F, J and O securities
Underwriter(s) or Distributor(s):
-
Promoter(s):
Mackenzie Financial Corporation
Project #1488675

Issuer Name:
MD Dividend Fund
MD International Growth Fund
Principal Regulator - Ontario
Type and Date:
Amendment #2 dated December 9, 2009 to Final Simplified Prospectuses dated June 4, 2009
NP 11-202 Receipt dated December 21, 2009
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
MD Management Limited
Promoter(s):
MD Private Trust Company
Project #1416049

Issuer Name:
Navina Income & Growth Fund
Principal Regulator - Ontario
Type and Date:
Final Simplified Prospectus dated December 18, 2009
NP 11-202 Receipt dated December 22, 2009
Offering Price and Description:
Class A units, Class F units and Class X units
Underwriter(s) or Distributor(s):
Lawrence Asset Management Inc.
Promoter(s):
Lawrence Asset Management Inc.
Project #1502642

Issuer Name:
NEMASKA EXPLORATION INC.
Principal Regulator - Quebec
Type and Date:
Final Long Form Prospectus dated December 18, 2009
NP 11-202 Receipt dated December 21, 2009
Offering Price and Description:
Minimum Offering: $3,761,000.00 (the “Minimum Offering”); Maximum Offering: $7,999,760.00 (the “Maximum Offering”) A minimum of 2,511 A Units and 2,500 B Units A maximum of 4,000 A Units, 5,092 B Units and 649 C Units at a price of $1,000 per A Unit, $500 per B Unit and $2,240 per C Unit
Underwriter(s) or Distributor(s):
CTI Capital Securities Inc.
Promoter(s):
M. Guy Bourassa
Project #1504214

Issuer Name:
Northern Rivers Conservative Growth Fund
Principal Regulator - Ontario
Type and Date:
Amendment #1 dated December 23, 2009 to Final Simplified Prospectus and Annual Information Form dated August 21, 2009
NP 11-202 Receipt dated January 5, 2010
Offering Price and Description:
-
Underwriter(s) or Distributor(s):
-
Promoter(s):
Northern Rivers Capital Management Inc.
Project #1449456

Issuer Name:
NovaGold Resources Inc.
Principal Regulator - British Columbia
Type and Date:
Final Short Form Base Shelf Prospectus dated December 30, 2009
NP 11-202 Receipt dated December 31, 2009
Offering Price and Description:
US$500,000,000.00:
Debt Securities
Preferred Shares
Common Shares
Warrants to Purchase Equity Securities
Warrants to Purchase Debt Securities
Share Purchase Contracts
Share Purchase or Equity Units
Underwriter(s) or Distributor(s):
-
Promoter(s):
-
Project #1512673

Issuer Name:
Phillips, Hager & North Canadian Equity Value Fund
Phillips, Hager & North Monthly Income Fund
Principal Regulator - British Columbia
Type and Date:
Final Simplified Prospectuses dated December 30, 2009
NP 11-202 Receipt dated December 30, 2009
Offering Price and Description:
Series C, D, F and O Units
Underwriter(s) or Distributor(s):
Phillips, Hager & North Investments Funds Ltd.
Phillips, Hager & North Investment Funds Ltd.
Promoter(s):
Phillips, Hager & North Investment Management Ltd.
Project #1499272

Issuer Name:
Pristine Power Inc.
Principal Regulator - Alberta
Type and Date:
Final Short Form Prospectus dated December 30, 2009
NP 11-202 Receipt dated December 30, 2009
Offering Price and Description:
$10,000,008.00 - 4,166,670 Units (Each Unit consisting of a Unit Share and one-half of one Warrant)
Underwriter(s) or Distributor(s):
National Bank Financial Inc.
Haywood Securities Inc.
Promoter(s):
-
Project #1517066

Issuer Name:
Timbercreek Mortgage Investment Corporation
Principal Regulator - Ontario
Type and Date:
Final Base Shelf Prospectus dated December 30, 2009
NP 11-202 Receipt dated December 30, 2009
Offering Price and Description:
Up to $180,000,000.00 of Class A Shares
Underwriter(s) or Distributor(s):
-
Promoter(s):
Timbercreek Asset Management Inc.
Project #1516628

Issuer Name:
Wells Fargo Financial Canada Corporation
Principal Regulator - Ontario
Type and Date:
Final Base Shelf Prospectus dated December 31, 2009
NP 11-202 Receipt dated January 5, 2010
Offering Price and Description:
$7,000,000,000.00 - Medium Term Notes (unsecured) Unconditionally guaranteed as to payment of principal, premium (if any), and interest by Wells Fargo & Company
Underwriter(s) or Distributor(s):
CIBC World Markets Inc.
RBC Dominion Securities Inc.
BMO Nesbitt Burns Inc.
Promoter(s):
-
Project #1515857

Issuer Name:
U.S. Geothermal Inc.
Principal Jurisdiction - British Columbia
Type and Date:
Preliminary Short Form Prospectus dated November 25, 2009
Withdrawn on December 31, 2009
Offering Price and Description:
$10,935,000.00 - 8,100,000 Units (each Unit consisting of one Common Share and one-half of one Share Purchase Warrant) and 243,000 Agents' Special Warrants) Price: $1.35 per Unit
Underwriter(s) or Distributor(s):
Dundee Securities Corporation
Clarus Securities Inc.
Toll Cross Securities Inc.
Promoter(s):
-
Project #1505869

Issuer Name:
Semcan Inc.
Type and Date:
Right Offering Circular dated December 30, 2009
Accepted December 30, 2009
Offering Price and Description:
Offer of Rights to Subscribe for Units at a Purchase Price of $0.06 per Unit
Underwriter(s) or Distributor(s):
-
.

Promoter(s):
-
Project #1502581

Chapter 12

Registrations

12.1.1 Registrants

Type	Company	Category of Registration	Effective Date
Name Change	From: Seaquest Capital Management Inc. To : Schwaben Capital Group Limited	Exempt Market Dealer And Portfolio Manager	December 17, 2009
Voluntary Surrender of Registration	Mondrian Investment Partners Limited	International Adviser (Portfolio Manager)	December 18, 2009
Voluntary Surrender of Registration	Borealis Infrastructure Management Inc.	Exempt Market Dealer	December 18, 2009
Voluntary Surrender of Registration	ICICI Wealth Management Inc.	Exempt Market Dealer	December 21, 2009
Voluntary Surrender of Registration	GAM USA Inc.	International Adviser (Portfolio Manager)	December 22, 2009
Voluntary Surrender of Registration	Anderson Capital Inc.	Exempt Market Dealer	December 22, 2009
Voluntary Surrender of Registration	Systematic Financial Management, L.P.	International Adviser (Portfolio Manager)	December 22, 2009
Voluntary Surrender of Registration	Eagle Boston Investment Management, Inc.	Portfolio Manager	December 22, 2009.
Voluntary Surrender of Registration	Eagle Asset Management, Inc.	Portfolio Manager	December 22, 2009.
Voluntary Surrender of Registration	Nuveen Asset Management Inc.	International adviser (Portfolio Manager)	December 22, 2009
Voluntary Surrender of Registration	Santa Barbara Asset Management Company, LLC	International Adviser (Portfolio Manager)	December 22, 2009

Type	Company	Category of Registration	Effective Date
Voluntary Surrender of Registration	Symphony Asset Management, LLC	International Adviser (Portfolio Manager)	December 22, 2009
Voluntary Surrender of Registration	Fidelity Retirement Services Company of Canada Limited.	Mutual Fund Dealer	December 22, 2009
Name Change	From: Ollerhead Capital Corporation To: Panvest Capital Corporation	Exempt Market Dealer	December 22, 2009
Voluntary Surrender of Registration	Navellier & Associates Inc.	International adviser (Portfolio Manager)	December 23, 2009
Voluntary Surrender of Registration	Ford Credit Canada Limited	Exempt Market Dealer	December 23, 2009
Voluntary Surrender of Registration	Concordia Capital Management Corp.	Portfolio Manager	December 23, 2009
Voluntary Surrender of Registration	Babson Capital Management LLC	International Adviser (Portfolio Manager)	December 23, 2009
Voluntary Surrender of Registration	Artisan Partners Holdings LP.	International Adviser (Portfolio Manager)	December 23, 2009
Voluntary Surrender of Registration	Advisory Research, Inc.	International Adviser (Portfolio Manager)	December 23, 2009
Voluntary Surrender of Registration	Qwest Investment Fund Management Ltd.	Portfolio Manager	December 24, 2009
Voluntary Surrender of Registration	Pictet Private Management Canada Inc.	Portfolio Manager	December 24, 2009
Voluntary Surrender of Registration	The Boston Company Asset Management	International Adviser (Portfolio Manager)	December 24, 2009
Voluntary Surrender of Registration	RWK Investment Capital Corporation	Exempt Market Dealer	December 24, 2009
Voluntary Surrender of Registration	GE Asset Management Incorporated	International Adviser (Portfolio Manager)	December 24, 2009

Type	Company	Category of Registration	Effective Date
New Registration	CI CAPITAL MARKETS INC.	Investment Dealer	December 31, 2009
Amalgamation	CI Investments Inc. and United Financial Corporation To Form: CI Investments Inc.	Exempt Market Dealer Portfolio Manager Commodity Trading Counsel Commodity Trading Manager	January 1, 2010
New Registration	Rocklinc Investment Partners Inc.	Portfolio Manager	January 4, 2010
New Registration	Afina Capital Management Inc	Portfolio Manager, Exempt Market Dealer and Investment Fund Manager	January 4, 2010
Voluntary Surrender of Registration	Robeco Investment Management Inc.	International Adviser (Portfolio Manager)	January 4, 2010
New Registration	Seven Seas Capital Management Inc.	Exempt Market Dealer, Portfolio Manager and Investment Fund Manager	January 4, 2010
Voluntary Surrender of Registration	Solaris Capital Advisors Inc.	Exempt Market Dealer	January 5, 2010
Voluntary Surrender of Registration	DPX Capital Inc.	Exempt Market Dealer	January 5, 2010
Voluntary Surrender of Registration	Edenview Financial Inc.	Exempt Market Dealer	January 5, 2010
Voluntary Surrender of Registration	Georgeson Shareholder Communications Canada Inc.	Exempt Market Dealer	January 5, 2010

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Chapter 13

SRO Notices and Disciplinary Proceedings

13.1.1 MFDA Issues Notice of Hearing Regarding Nathan H. Disenhouse

NEWS RELEASE
For immediate release

MFDA ISSUES NOTICE OF HEARING REGARDING NATHAN H. DISENHOUSE

January 5, 2010 (Toronto, Ontario) – The Mutual Fund Dealers Association of Canada ("MFDA") today announced that it has commenced disciplinary proceedings against Nathan Hersh Disenhouse (the "Respondent").

MFDA staff alleges in its Notice of Hearing that the Respondent engaged in the following conduct contrary to the By-laws, Rules or Policies of the MFDA:

Allegation 1: Between October 2004 and October 2005, the Respondent engaged in securities related business that was not carried on for the account of the Member and through the facilities of the Member by selling, referring or facilitating the sale of an investment product that was not approved for sale by the Member to 18 individuals, 11 of whom were clients, contrary to MFDA Rules 1.1.1 and 2.1.1.

Allegation 2: Between October 2004 and October 2005, the Respondent engaged in a dual occupation that was not disclosed to and approved by the Member by selling, referring or facilitating the sale of an investment product to 18 individuals, 11 of whom were clients, contrary to MFDA Rules 1.2.1(d) and 2.1.1.

Allegation 3: Between October 2004 and October 2005, the Respondent failed to disclose to investors in the above-noted investment product that he had an interest in the company offering the investment product, thereby placing his own interests above those of the investors and giving rise to an actual or potential conflict of interest which he failed to address by the exercise of responsible business judgment influenced only by the best interests of the investors, contrary to MFDA Rules 2.1.4 and 2.1.1.

Allegation 4: Between 2005 and 2008, the Respondent engaged in a dual occupation that was not disclosed to and approved by the Member by entering into a referral agreement and referring clients to a third party that administered pension plans, contrary to MFDA Rules 1.2.1(d) and 2.1.1.

Allegation 5: Between February 2006 and 2008, the Respondent obtained and maintained blank, pre-signed trading forms in client files and used such forms to process a trade in at least one client account, thereby:

a. failing to comply with the Member's express directions that he obtain original client signatures on trading authorization forms, contrary to MFDA Rules 1.1.2 and 2.5.1; and

b. failing to observe high standards of ethics and engaging in business conduct or practice that was unbecoming, contrary to MFDA Rule 2.1.1

The first appearance in this matter will take place by teleconference before a Hearing Panel of the MFDA's Central Regional Council on February 8, 2010 at 10:00 a.m. (Eastern), or as soon thereafter as the appearance can be held. The purpose of the first appearance is to schedule the date for the commencement of the hearing of this matter on its merits and to address any other procedural matters and will be open to the public, except as may be required for the protection of confidential matters.

A copy of the Notice of Hearing is available on the MFDA website at www.mfda.ca.

The MFDA is the self-regulatory organization for Canadian mutual fund dealers, regulating the operations, standards of practice and business conduct of its 141 Members and their approximately 75,000 Approved Persons with a mandate to protect investors and the public interest.

For further information, please contact:
Shaun Devlin
Vice-President, Enforcement
416-943-4672 or sdevlin@mfda.ca

13.1.2 MFDA Hearing Panel Reschedules Marlene Legare Hearing

NEWS RELEASE
For immediate release

MFDA HEARING PANEL RESCHEDULES MARLENE LEGARE HEARING

January 5, 2010 (Toronto, Ontario) – The Mutual Fund Dealers Association of Canada ("MFDA") commenced a disciplinary proceeding in respect of Marlene Legare by Notice of Hearing dated June 12, 2008.

The hearing of this matter on its merits, previously scheduled to take place on January 18-22, 2010, has been rescheduled to April 19-23, 2010 at 10:00 a.m. (Pacific), or as soon thereafter as the hearing can be held, in the hearing room located at the Wosk Centre for Dialogue, 580 West Hastings Street, Vancouver, British Columbia. The hearing will be open to the public, except as may be required for the protection of confidential matters.

A copy of the Notice of Hearing is available on the MFDA website at www.mfda.ca.

The MFDA is the self-regulatory organization for Canadian mutual fund dealers, regulating the operations, standards of practice and business conduct of its 141 Members and their approximately 75,000 Approved Persons with a mandate to protect investors and the public interest.

For further information, please contact:
Marco Wynnyckyj
Hearings Coordinator
416-945-5146 or mwynnyckyj@mfda.ca

13.1.3 IIROC Rules Notice – Notice of Approval – UMIR – Provisions Respecting Trading During Certain Securities Transactions

IIROC NOTICE

RULES NOTICE

NOTICE OF APPROVAL – UMIR

10-306
January 8, 2010

PROVISIONS RESPECTING TRADING DURING CERTAIN SECURITIES TRANSACTIONS

Summary

This IIROC Rules Notice provides notice of the approval, effective January 8, 2010, by the applicable securities regulatory authorities (the "Recognizing Regulators") of amendments to the Universal Market Integrity Rules ("UMIR") respecting trading during certain securities transactions ("Amendments"). In particular, the Amendments:

- peg the price restriction on purchases of a restricted security to the "best independent bid price" at the time of the entry of the order rather than the "last independent sale price" immediately prior to the execution of the order;
- provide that any mutual fund listed on an exchange that meets certain conditions would be an "Exempt Exchange-traded Fund" unless otherwise designated by a Market Regulator;
- make consequential amendments to the definition of "restricted private placement" as a result of changes to applicable securities legislation;
- clarify the definitions of "dealer-restricted person" and "restricted period";
- clarify that the orders to be taken into account in determining "best ask price" and "best bid price" are limited to orders on marketplaces then open for trading; and
- make a number of editorial amendments including: repealing the definition of "last independent sale price"; changing references from "Exchange-traded Fund" to "Exempt Exchange-traded Fund"; and clarifying the definition of "connected security".

Background to the Amendments

UMIR Provisions Prior to the Amendments

Rule 7.7 governs the activities of dealers, issuers and others in connection with a distribution of securities, securities exchange take-over bid, issuer bid or amalgamation, arrangement, capital reorganization or similar transaction. Rule 7.7 prescribes acceptable activities and otherwise restricts trading activities to preclude manipulative conduct by persons with an interest in the outcome of the distribution of securities or other transactions.[1]

The following is a summary of the provisions of Rule 7.7 in effect prior to the Amendments. Rule 7.7 imposes prohibitions or restrictions on a "dealer-restricted person" trading in certain securities during a "restricted period". A dealer-restricted person is defined as including a Participant that has been retained as:

- an underwriter in a prospectus distribution or restricted private placement;
- an agent, but not as an underwriter, in a restricted private placement that involves the distribution of more than 10% of the issued and outstanding shares and the Participant is entitled to sell more than 25% of the distribution;
- a dealer-manager, manager, soliciting dealer or adviser in respect of a securities exchange takeover bid or issuer bid if a security is offered as consideration; or

[1] For more details on the provisions of UMIR prior to the approval of the Amendments, reference should be made to Market Integrity Notice 2005-007 - *Notice of Amendment Approval – Amendments Respecting Trading During Certain Securities Transactions* (March 4, 2005).

- a soliciting dealer or adviser in respect of the approval of an amalgamation, arrangement, capital reorganization or s1imilar transaction.

In addition, a number of persons connected to the Participant will be considered to be a dealer-restricted person including:

- a related entity of the Participant (but not including various separate or distinct departments or divisions for which there are adequate policies and procedures to prevent the flow of information);
- a dealer, a partner, director, officer, or employee of the Participant or a related entity of the Participant; and
- a person acting jointly or in concert with the Participant or one of the connected persons.

A restricted security is defined as:

- an offered security, which includes a listed or quoted security:
  - that is the subject of a prospectus distribution or restricted private placement,
  - offered in a securities exchange take-over bid or an issuer bid, and
  - issuable pursuant to an amalgamation, arrangement, capital reorganization or similar transaction; or
- a connected security, which includes a listed or quoted security:
  - into which the offered security is immediately convertible, exchangeable or exercisable,
  - that, by the terms of the offered security, may significantly determine the value of the offered security,
  - into which the offered security is exercisable, if the offered security is a special warrant, and
  - that is an equity security of the issuer of the offered security.

During the restricted period (which, in the case of a prospectus distribution or restricted private placement, generally commences two days prior to the determination of pricing and ends on the completion of the selling process and, in the case of a take-over bid, issuer bid, amalgamation, arrangement, capital reorganization or similar transaction, commences on the date of the dissemination of the circular or similar document and ends on the termination of the bid or transaction or the approval of the transaction), a dealer-restricted person is not permitted to bid for or purchase a restricted security or attempt to "induce or cause any person to purchase a restricted security". A number of exemptions apply including the ability to bid or purchase a restricted security:

- in the case of an offered security, at a price which does not exceed the lesser of:
  - the price at which the offered security will be issued if that price has been determined, and
  - the last independent sale price at the time of the entry of the order to purchase;
- in the case of a connected security, at a price which does not exceed the lesser of:
  - the last independent sale price at the commencement of the restricted period, and
  - the last independent sale price at the time of the entry of the order to purchase;
- that is a "highly-liquid security"[2] or an "Exchange-traded Fund"[3]; and

[2] A "highly-liquid security" is defined in UMIR as a listed security or quoted security that:
- has traded, in total, on one or more marketplaces as reported on a consolidated market display during a 60-day period ending not earlier than 10 days prior to the commencement of the restricted period:
  - an average of at least 100 times per trading day, and
  - with an average trading value of at least $1,000,000 per trading day; or
- is subject to Reg. M and is considered to be an "actively-traded security" under that regulation.

[3] See 'Definition of an "Exempt Exchange-traded Fund"' on pages 8 and 9 for details.

- that is an unsolicited client order or a client order that was solicited prior to the commencement of the restricted period.

Exemptions are also provided for trades that are:

- basket trades (at least 10 securities with restricted securities comprising not more than 20% of the value of the transaction);
- Program Trades (undertaken in conjunction with a trade in a derivative in accordance with marketplace rules);
- rebalancing of portfolios based on index changes;
- arbitrage activities for inter-listed securities;
- activities pursuant to market maker obligations in accordance with marketplace rules; and
- activities undertaken by derivatives market makers.

Where permitted by applicable securities legislation, a dealer-restricted person may "attempt to induce or cause a person to purchase a restricted security" by:

- soliciting subscriptions for the prospectus distribution or restricted private placement or soliciting tenders to a take-over bid or issuer bid; and
- publishing or disseminating information, opinions or recommendations on any other restricted security if similar information opinions or recommendations are included on other issuers or if the security of the issuer is a "highly-liquid security".

Subject to certain limited exemptions, a dealer-restricted person may not bid for or purchase a restricted security during the applicable restricted period on behalf of an "issuer-restricted person" (which includes the issuer, a selling securityholder, an affiliated entity, an associated entity, an insider, an account over which any of these persons exercises direction or control, and any person acting jointly or in concert with any of these other persons).

OSC Rule 48-501 and Regulation M

Effective May 9, 2005, OSC Rule 48-501 became effective and paragraph 26 of OSC Policy 5.1 and OSC Policy 62-601 were rescinded. The provisions of Rule 7.7 of UMIR paralleled the provisions of OSC Rule 48-501 subject to a number of differences in language, structure and scope that reflect:

- the use of different defined terms and drafting protocols;
- the application of the UMIR provisions in all jurisdictions in which IIROC is recognized as a self-regulatory entity as compared to the application of OSC Rule 48-501 in Ontario only;
- the application of the UMIR provisions to listed securities and quoted securities as compared to the application of OSC Rule 48-501 to all securities the trading of which are subject to transparency requirements under the Marketplace Operation Instrument (including any foreign exchange-traded security that may also trade on an alternative trading system); and
- the application of the UMIR provisions to Participants and Access Persons as compared to the application of OSC Rule 48-501 to all persons, including issuers and dealers.

It should be noted that clause 3.1(i) of OSC Rule 48-501 allows a dealer to rely on exemptions contained in UMIR. In particular, Rule 7.7 of UMIR allows a dealer-restricted person to bid for or purchase a restricted security as part of:

- a basket trade;
- a Program Trade;
- rebalancing of portfolios based on index changes;
- arbitrage activities for inter-listed securities;

- activities pursuant to Market Maker Obligations; and
- activities undertaken by derivatives market makers.

With the approval of the Amendments, the provisions of UMIR differ from those of OSC Rule 48-501. However, there are no substantive differences between Rule 7.7 of UMIR and OSC Rule 48-501 other than as a result of the four factors outlined above. Generally speaking, most of the changes introduced by the Amendments are clarifications on the application of the existing provisions. As such, UMIR and OSC Rule 48-501 will be applied in a consistent manner. OSC Rule 48-501 will continue to tie its restrictions on purchases by a dealer-restricted person to the "last independent sale price" rather than to the "best independent bid price" as provided for under the Amendments. However, it should be noted that clause 3.1(i) of OSC Rule 48-501 allows a dealer to rely on exemptions contained in UMIR (which would include the exemption provided for purchases using reference to the "best independent bid price" that is provided as a result of the adoption of the Amendments).

One of the stated objectives of both IIROC and the OSC is to harmonize the provisions in UMIR governing the activities of Participants involved in various securities transactions in the capacity of underwriter, agent, soliciting dealer or adviser to the extent possible with OSC Rule 48-501 and the provisions applicable in the United States under Regulation M ("Reg. M") of the *Securities Exchange Act of 1934* (United States). On December 9, 2004, the Securities and Exchange Commission ("SEC") published for comment proposed amendments to Reg. M.[4] On August 6, 2007, the SEC published approved amendments to Rule 105 of Reg. M that prevent a person from effecting a short sale during a limited time period, shortly before pricing, and then purchasing, including entering into a contract of sale for, such security in a securities offering.[5] The Amendments do not incorporate any of the provisions suggested in 2004 for the amendment of Reg. M or the change to Rule 105 adopted in August of 2007. In addition, the Amendments do not address the matters which were covered by specific questions in the Request for Comments related to:

- changing the definition of a "highly-liquid security" to increase the number and value of trades in order to qualify;
- harmonization with certain provisions of Reg M;
- adding specific provisions related to prohibitions and restrictions on distribution "at-the-market" or "non-fixed price";
- providing additional exemptions when acting on behalf of an issuer-restricted person.[6]

Any amendments which IIROC may propose at a future date on these matters will be coordinated with proposed amendments by the OSC to OSC Rule 48-501.

Summary of the Amendments

The following is a summary of the principal components of the Amendments:

Price Restrictions

"Best Independent Bid Price" at Time of Order Entry

Rule 7.7 of UMIR imposes prohibitions or restrictions on a Participant who is a "dealer-restricted person" trading in certain securities during a "restricted period" including a prohibition of bidding for or purchasing a restricted security. One exemption from this prohibition permits bids or purchases at a price that is not above the "last independent sale price" of the security. The term "last independent sale price" is defined as including "the last sale price of a trade, other than a trade that a dealer-restricted person knows or ought reasonably to know has been executed by or on behalf of a person that is a dealer-restricted person".

IIROC recognizes that there are practical difficulties for a Participant or Access Person to monitor affected orders to ensure compliance with the requirements of Rule 7.7. If trade information from all marketplaces is not available in a timely manner in a

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4 SEC Release No. 33-8511, December 9, 2004. The more significant aspects of the proposed amendments to Reg. M would:

- amend the definition of restricted period for an initial public offering and to specifically adopt the administrative interpretation of the SEC in the context of a merger, acquisition or exchange offer;
- update the dollar value thresholds, including for an "actively-traded security", to take into account inflation since the adoption of Reg. M; and
- require disclosure of syndicate covering transactions and prohibit the use penalty bids when stabilization is undertaken.

5 SEC Release No. 34-56206, August 6, 2007.

6 For details on the matters covered by the specific questions, refer to Market Integrity Notice 2008-005 – *Request for Comments – Provisions Respecting Trading During Certain Securities Transactions* (March 21, 2008), pp. 17 to 24.

form that can be readily incorporated into the working of the trading system of a marketplace or the systems of a Participant, the systems can not accurately restrict purchases by a dealer-restricted person that would comply with Rule 7.7. The policy rationale for the price restrictions on a Participant involved in a distribution of securities (by means of a prospectus offering, private placement, take-over bid, issuer bid, amalgamation, arrangement or similar transaction) are aimed at removing the influence of the Participant in maintaining the price of the securities subject to the distribution at a price above a level that the market would otherwise determine. IIROC believes that the policy objectives underpinning the price restrictions on purchases during market stabilization and market balancing can be achieved by replacing the "last sale" price test with a restriction that the order can not be entered at a price above the best "independent" bid price at the time of order entry (and that any subsequent variation of the order can not increase the price of the order to a price that is more than the best "independent" bid price at the time of the variation of the order).

If the price of the order at the time of entry or variation is in line with the prevailing market there is no obvious attempt on the part of a dealer-restricted person to further increase the market price to a level that would not otherwise exist. In the view of IIROC, the elimination of tests based on the "last sale price" will assist Participants to manage affected orders and would facilitate the operation of systems that can enforce the price restrictions imposed by the rules. In order to comply with the "best price" obligations imposed by Rule 5.2, a Participant must be aware of the prevailing market as displayed in the consolidated market display at the time of the entry of the order that includes order information from each "protected marketplace".[7] Currently, each of Alpha, Chi-X, CNSX (including Pure Trading), Omega, TSX and TSXV qualify as a "protected marketplace".

If a dealer-restricted person is entering an order in a "pre-open" facility of a marketplace, IIROC is of the view that the price limitation on the order will be the best independent bid price on any protected marketplace that is then open for trading. If no protected marketplace is open for trading or if there is no "independent" bid, the price limitation on the order will be the best independent bid price at the time of closing of trading on the last protected marketplace or marketplaces open for trading on the immediately preceding trading day.

Clarification of Price Restrictions in Certain Securities Transactions

In *Market Integrity Notice 2005-013 – Effective Date of Amendments Respecting Trading During Certain Securities Transactions* (May 2, 2005), additional guidance was provided on the interpretation of the price restrictions. In particular, the guidance confirmed that if an "offered security" was to be issued pursuant to:

- *a securities exchange take-over bid;*
- *an issuer bid; or*
- *an amalgamation, arrangement, capital reorganization or similar transaction,*

a dealer-restricted person may bid or purchase the offered security in connection with market stabilization or market balancing activities at a price which does not exceed the lesser of:

- the last independent sale price at the commencement of the restricted period; and
- the last independent sale price at the time of the entry on a marketplace of the order to purchase.

The Amendments incorporate this advice directly into Rule 7.7 with the appropriate modifications to refer to the "best independent bid price" rather than the "last independent sale price".

Definition of "best independent bid price"

The Amendments define the "best independent bid price" as the best bid price, other than for an order that a dealer-restricted person knows or ought reasonably to know has been entered by or on behalf of a person that is a dealer-restricted person or an issuer-restricted person.

[7] Under UMIR a "protected marketplace" means a marketplaces that:
- disseminate order data in real-time and electronically through the information processor or one or more information vendors;
- permit dealers to have access to trading in the capacity as agent;
- provide fully-automated electronic order entry; and
- provide fully-automated order matching and trade execution.

Definition of "Exempt Exchange-traded Fund"

Prior to the Amendments, UMIR defined an "Exchange-traded Fund" as a mutual fund:

- the units of which are:
  - a listed security or a quoted security, and
  - in continuous distribution in accordance with applicable securities legislation; and
- designated by the Market Regulator.

A security which qualified as an "Exchange-traded Fund" was exempt from the price restrictions imposed on Participants involved in certain securities transactions during a "restricted period" for the purposes of Rule 7.7 of UMIR. To date, IIROC has designated a total of 77 securities traded on the TSX as an "Exchange-traded Fund"[8]. Each of the securities designated by IIROC as an "Exchange-traded Fund" has also been designated by the OSC to be an "exchange-traded fund" for the purposes of OSC Rule 48-501.

The Amendments replace references to "Exchange-traded Fund" with "Exempt Exchange-traded Fund". In addition, the Amendments replace the requirement that a mutual fund be designated by the Market Regulator prior to qualifying as an "Exempt Exchange-traded Fund" with a provision that any mutual fund the units of which are a listed or quoted security in continuous distribution in accordance with applicable securities legislation would qualify unless the Market Regulator had designated the mutual fund to be a security excluded from the definition of an "Exempt Exchange-traded Fund". Each of the securities which have designated to date by IIROC as an "Exchange-traded Fund" will qualify as an "Exempt Exchange-traded Fund".

The Amendments set out guidance in the Policy respecting the factors that may be considered by the Market Regulator in determining to exclude a mutual fund from the definition. In particular, a mutual fund may be designated if the Market Regulator determines that the trading price of units of the fund may be susceptible to manipulation due to a particular feature of the mutual fund. Factors which the Market Regulator would take into account in making a designation to exclude a particular mutual fund would be:

- the lack of liquidity or public float of the security (or the underlying securities which comprise the portfolio of the mutual fund);
- the absence of the ability to redeem units at any time for a "basket" of the underlying securities in addition to cash;
- the absence of the ability to exchange a "basket" of the underlying securities at any time for units of the fund;
- the fact that the fund does not frequently make a net asset valuation calculation publicly available; and
- the fact that there are no derivatives based on units of the fund, the underlying index or the underlying securities listed on a marketplace.

None of these additional five factors would be determinative in and of itself and each security would be evaluated on its own merits.

Definition and Interpretation of "Restricted Period"

Previously, the definition of the "restricted period" provided that the restricted period commenced two trading days prior to the day the offering price of the offered security was determined. The Amendments clarify that this aspect of the definition applies if the securities are to be issued at a fixed price as part of a non-continuous distribution. The Amendments also clarify that, if the offering price is determined by a formula involving trading activity in the offered security or a connected security on one or more marketplaces for a period of time, the restricted period commences two days prior to the first trading day included for the purposes of the formula. The Amendments provide that the restricted period will commence two trading days prior to the issuance of the offered security, if the securities are issued as part of:

[8] See IIROC Notice 09-0035 - Rules Notice – Guidance Note – UMIR – *Designation of Additional Exchange-traded Funds* (February 3, 2009). A current list of the securities which have been designated by IIROC as an "Exchange-traded Fund" ("ETF List") is available on the IIROC website (at www.iiroc.ca) and may be accessed through the "Quick Links" on the homepage.

- a continuous distribution;
- a distribution at a non-fixed price permitted by National Instrument 44-101 – *Short Form Prospectus Distributions;* or
- an at-the-market distribution for the purposes of National Instrument 44-102 – *Shelf Distributions.*

The Amendments confirm that in both of these cases, the "restricted period" may commence later if the Participant enters into an agreement or reaches an understanding to participate in the prospectus distribution or restricted private placement of securities, whether or not the terms and conditions of such participation have been agreed upon less than two trading days prior to the determination of the offering price or the issuance of the offered security.

The Amendments also clarify the interpretation of "restricted period" and confirm that stabilization arrangement shall be considered to have terminated on the date that is the earlier of the date:

- in the case of a syndicate of underwriters or agents, the lead underwriter or agent determines, in accordance with the syndication agreement, that the syndication agreement has been terminated such that any purchase or sale of a restricted security by a Participant after the time of termination is not subject to the stabilization arrangements or otherwise made jointly for the Participants that were party to the stabilization arrangements, or
- the offered securities, exclusive of any securities that may be issued pursuant to the exercise of an option granted to a dealer-restricted person to cover over-allotment of securities in the distribution, are issued and all statutory rights of withdrawal in connection with such issuance have expired.

By providing that the "restricted period" ends if the offered securities, exclusive of any securities that may be issued pursuant to the exercise of an option granted to a dealer-restricted person to cover over-allotment of securities in the distribution, are issued and all statutory rights of withdrawal in connection with such issuance have expired, the interpretation will permit a Participant that has been involved in a prospectus distribution or a restricted private placement and holds a green shoe option to cover over-allotments to be free from the prohibitions and restrictions under Rule 7.7. Since the issuance of the offered securities has been completed and all statutory rights of withdrawal have expired, the dealer-restricted person no longer has the same incentive to maintain the market price of the offered security. If the Participant has a short position in the offered securities as a result of over-allotments, the Participant would be able to purchase securities in the open market or exercise the green shoe option. (The Amendments revised the initial proposal by deleting reference to the expiry of "rights of rescission" since including rights of rescission may have had the effect of making the restricted period unduly long. The Amendments also revised the initial proposal by moving the provisions regarding the green shoe option from the definition to the interpretation of the term "restricted period".)

Definition of "Restricted Private Placement"

The Amendments clarify the types of private placements that may become subject to the restrictions and prohibitions under Rule 7.7 as a result of changes in applicable securities legislation subsequent to May 9, 2005, the date the current provisions of Rule 7.7 became effective. Under the Amendments, a "restricted private placement" includes a distribution made pursuant to:

- section 2.3, 2.9 or 2.10 of National Instrument 45-106 – *Prospectus and Registration Exemptions*; or
- section 2.1 of Ontario Securities Commission Rule 45-501 – *Ontario Prospectus and Registration Exemptions* or similar provisions of applicable securities legislation.

In addition, the Amendments are applicable to a distribution only if the number of securities to be distributed constitutes more than 10% of the issued and outstanding securities of the class subject to the distribution. This limiting condition was, prior to the Amendments, in the definition of a "dealer-restricted person" and the Amendments move the condition to the definition of "restricted private placement" to simplify the interpretation of the concept.

Interpretation of "Best Ask Price" and "Best Bid Price"

The Amendments clarify that in determining the "best ask price" or the "best bid price" reference is only made to orders contained in a consolidated market display for a marketplace that is then open for trading and in respect of which trading in the particular security on that marketplace has not been:

- halted, suspended or delayed for regulatory purposes in accordance with Rule 9.1; or
- halted, suspended or delayed in accordance with a Marketplace Rule or a requirement of the marketplace.

This clarification in the interpretation of the "best ask price" and "best bid price" will directly affect the determination of "best independent ask price" and "best independent bid price". This interpretation is consistent with guidance provided by IIROC in connection with the determination of the orders to which a "best price" obligation is owed under Rule 5.2 of UMIR. As a practical matter, this interpretation of "best ask price" and "best bid price" will result in a dealer-restricted person being unable to enter a bid (or an offer if sell orders also restricted) in the "pre-open" facility of a marketplace unless the security is able to be traded on another marketplace that is then open for trading.

Consequential and Editorial Amendments

The Amendments include a number of provisions which are consequential or of an editorial nature including:

- the repeal of the definition of "last independent sale price" as a consequence of the changes in the price restrictions imposed on dealer-restricted persons during the restricted period;
- the deletion from the definition of "dealer-restricted person" of the concept of acting as agent in a private placement constituting more than 10% of the issued and outstanding securities of the class that is subject to the distribution as a consequence of the changes in the definition of "restricted private placement" to specifically include this limitation; and
- editorial changes to:
    - standardize the use of the phrase "foreign organized regulated market" when otherwise referring to foreign markets on which trades may be executed, and
    - clarify the definition of "connected security" by indicating that a security which meets any one of the components of the definition will be considered a "connected security".

Summary of the Impact of the Amendments

The most significant impacts of the adoption of the Amendments are to:

- move the time for determining compliance with the price restrictions on market stabilization and market balancing activities to the time of order entry on a marketplace rather than time of execution;
- relieve a Participant from restrictions and prohibitions under Rule 7.7 if the Participant holds a green shoe option and all other offered securities have been issued and all statutory rights of withdrawal in connection with such issuance have expired;
- confirm that price restrictions apply under Rule 7.7 if the price at which the offered security will be issued in a prospectus distribution or restricted private placement has not been determined or if the offered security will be issued pursuant to a securities exchange take-over bid, an issuer bid or an amalgamation, arrangement, capital reorganization or similar transaction; and
- clarify that the restricted period will commence two trading days prior to the issuance of the offered security, if the securities are issued as part of:
    - a continuous distribution,
    - a distribution at a non-fixed price permitted by National Instrument 44-101 – *Short Form Prospectus Distributions,* or
    - an at-the-market distribution for the purposes of National Instrument 44-102 – *Shelf Distributions.*

Implementation Plan

The Amendments are effective as of January 8, 2010, the date of the approval of the Amendments by the Recognizing Regulators. With the exception of the amendment to clause (a) of subsection (4) of Rule 7.7, the Amendments are implemented on the effective date.

Presently, neither marketplaces nor Participants are in a position to system-enforce compliance with the price restrictions on a dealer-restricted person based on the last sale price at the time of execution. However, the Amendments would change one of the essential components of the price restrictions on purchases by a dealer-restricted person during a restricted period from the last independent sale price of a security at the time of the execution of the order to the best independent bid price at the time of

the entry of the order. Participants may therefore chose to system-enforce market stabilization price restrictions at the time of order entry. In order to provide Participants and service providers with an opportunity to make changes to their programming to accommodate the introduction of this change, implementation of the changes to clause (a) of subsection (4) of Rule 7.7 related to price restrictions is deferred until May 8, 2010, being 120 days following the date of approval of the Amendments by the Recognizing Regulators.

Appendices

- Appendix "A" sets out the text of the Amendments to the Rules and Policies respecting trading during certain securities transactions; and

- Appendix "B" sets out a summary of the comment letters received in response to the Request for Comments on the proposed amendments as set out in Market Integrity Notice 2008-005 - *Request for Comments – Provisions Respecting Trading During Certain Securities Transactions* (March 21, 2008). Appendix "B" also sets out the response of IIROC to the comments received and provides additional commentary on the Amendments. Appendix "B" also contains the text of the relevant provisions of the Rules and Policies as they read following the adoption of the Amendments. The revisions made to the Stabilization Proposal as a result of these comments are highlighted in column 1. The revisions generally are consequential or editorial in nature.

Appendix "A"

Provisions Respecting Trading During Certain Securities Transactions

The Universal Market Integrity Rules are hereby amended as follows:

1. Rule 1.1 is amended by:

(a) deleting the word "and" at the end of clause (c) of the definition of "connected security" and substituting "or";

(b) inserting the following definition of "best independent bid price":

> **"best independent bid price"** means the best bid price, other than for an order that a dealer-restricted person knows or ought reasonably to know has been entered by or on behalf of a person that is a dealer-restricted person or an issuer-restricted person.

(c) deleting subclause (ii) of clause (a) of the definition of "dealer-restricted person" and substituting the following:

> (ii) is participating, as agent but not as an underwriter, in a restricted private placement of securities and the Participant has been allotted or is otherwise entitled to sell more than 25% of the securities to be issued under the restricted private placement,

(d) deleting the definition of "Exchange-traded Fund" and inserting the following definition of "Exempt Exchange-traded Fund":

> **"Exempt Exchange-traded Fund"** means a mutual fund for the purposes the purposes of applicable securities legislation, the units of which:
>
> (a) are a listed security or a quoted security; and
>
> (b) are in continuous distribution in accordance with applicable securities legislation
>
> but does not include a mutual fund that has been designated by the Market Regulator to be excluded from this definition.

(e) deleting the definition of "last independent sale price"; and

(f) deleting clause (a) of the definition of "restricted period" and substituting the following:

> (a) in connection with a prospectus distribution or a restricted private placement of any offered security, commencing two trading days prior to:
>
> (i) the day the offering price of the offered security is determined, if the securities are to be issued at a fixed price as part of a non-continuous distribution, or
>
> (ii) the issuance of the offered security, if the securities are issued as part of:
>
> (A) a continuous distribution,
>
> (B) a distribution at a non-fixed price permitted by National Instrument 44-101 – *Short Form Prospectus Distributions*, or
>
> (C) an at-the-market distribution for the purposes of National Instrument 44-102 – *Shelf Distributions*,
>
> and ending on the date the selling process has ended and all stabilization arrangements relating to the offered security are terminated provided that, if the person is a dealer-restricted person, the period shall commence on the date the Participant enters into an agreement or reaches an understanding to participate in the prospectus distribution or restricted private placement of securities, whether or not the terms and conditions of such participation have been agreed upon if that date is later that determined for the purposes of clause (i) or (ii);

(g) deleting the definition of "restricted private placement" and substituting the following:

"restricted private placement" means a distribution of securities made pursuant to:

(a) section 2.3, 2.9 or 2.10 of National Instrument 45-106 – *Prospectus and Registration Exemptions*; or

(b) section 2.1 of Ontario Securities Commission Rule 45-501 – *Ontario Prospectus and Registration Exemptions* or similar provisions of applicable securities legislation,

and the number of securities to be distributed constitutes more than 10% of the issued and outstanding securities of the class subject to the distribution.

2. Subsection (6) of Rule 1.2 is amended by:

(a) deleting the word "and" at the end of clause (a);

(b) deleting clause (b) and substituting the following:

(b) stabilization arrangements shall be considered to have terminated on the date that is the earlier of when:

(i) in the case of a syndicate of underwriters or agents, the lead underwriter or agent determines, in accordance with the syndication agreement, that the syndication agreement has been terminated such that any purchase or sale of a restricted security by a Participant after the time of termination is not subject to the stabilization arrangements or otherwise made jointly for the Participants that were party to the stabilization arrangements, or

(ii) the offered securities, exclusive of any securities that may be issued pursuant to the exercise of an option granted to a dealer-restricted person to cover over-allotment of securities in the distribution, are issued and all statutory rights of withdrawal in connection with such issuance have expired; and

(c) inserting the following as clause (c):

(c) if the offering price is determined by a formula involving trading activity in the offered security or a connected security on one or more marketplaces for a period of time, the offering price shall be considered to be determined on the first trading day included in the calculation for the purposes of the formula.

3. Rule 1.2 is amended by adding the following as subsection (8):

(8) For the purposes of determining the "best ask price" or the "best bid price" at any particular time reference is made to orders contained in a consolidated market display for a marketplace that is then open for trading and in respect of which trading in the particular security on that marketplace has not been:

(a) halted, suspended or delayed for regulatory purposes in accordance with Rule 9.1; or

(b) halted, suspended or delayed in accordance with a Marketplace Rule or a requirement of the marketplace.

4. Rule 3.1 is amended by inserting in clause (g) of subsection (2) the word "Exempt" prior to the word "Exchange-traded".

5. Rule 7.7 is amended by:

(a) deleting the phrase "the lesser of" in clause (a) of subsection (4);

(b) deleting subclause (i) of clause (a) of subsection (4) and substituting the following:

(i) in the case of an offered security, the least of:

(A) the price at which the offered security will be issued in a prospectus distribution or restricted private placement, if that price has been determined,

(B) the best independent bid price at the commencement of the restricted period if the price at which the offered security will be issued in a prospectus distribution or restricted private placement has not been determined or if the offered security will be issued pursuant to a securities exchange take-over bid, an issuer bid or an amalgamation, arrangement, capital reorganization or similar transaction, and

(C) the best independent bid price at the time of the entry on a marketplace of the order to purchase,

(c) inserting in subsclause (ii) of clause (a) of subsection (4) the phrase ", the lesser of" after the word "security";

(d) deleting in paragraph (A) of subclause (ii) of clause (a) of subsection (4) the phrase "last independent sale price" and substituting "best independent bid price";

(e) deleting in paragraph (B) of subclause (ii) of clause (a) of subsection (4) the phrase "last independent sale price" and substituting "best independent bid price";

(f) inserting in subclause (ii) of clause (b) of subsection (4) the word "Exempt" prior to the word "Exchange-traded"; and

(g) deleting in subclause (i) of clause (c) of subsection (7) the phrase "market" and substituting "marketplace or foreign organized regulated market".

The Policies to the Universal Market Integrity Rules are hereby amended as follows:

1. Part 2 of Policy 1.1 is deleted and the following substituted:

Part 2 – Definition of "Exempt Exchange-traded Fund"

An "Exempt Exchange-traded Fund" is defined, in part, as a mutual fund for the purposes of applicable securities legislation, the units of which are a listed security or a quoted security and are in continuous distribution in accordance with applicable securities legislation. The definition excludes a mutual fund that has been designated by the Market Regulator to be excluded from the definition.

As guidance, a mutual fund may be designated by the Market Regulator if it is determined that the trading price of units of the fund may be susceptible to manipulation due to a particular feature of the mutual fund. Factors which the Market Regulator would take into account in making a designation to exclude a particular mutual fund would be:

- the lack of liquidity or public float of the security (or the underlying securities which comprise the portfolio of the mutual fund);
- the absence of the ability to redeem units at any time for a "basket" of the underlying securities in addition to cash;
- the absence of the ability to exchange a "basket" of the underlying securities at any time for units of the fund;
- the fact that the fund does not frequently make a net asset value calculation publicly available; and
- the fact that there are no derivatives based on units of the fund, the underlying index or the underlying securities are listed on a marketplace.

None of these additional five factors is determinative in and of itself and each security will be evaluated on its own merits.

Appendix "B"

Comments Received in Response to
Market Integrity Notice 2008-005 – *Request for Comments -*

Provisions Respecting Trading During Certain Securities Transactions

On March 21, 2008, Market Regulation Services Inc. ("RS") issued Market Integrity Notice 2008-005 requesting comments on proposed amendments to UMIR respecting trading during certain securities transactions ("Stabilization Proposal"). Effective June 1, 2008, RS merged with the Investment Dealers Association of Canada to form the Investment Industry Regulatory Organization of Canada ("IIROC"). References to "IIROC" include RS prior to June 1, 2008. IIROC received comments on the Stabilization Proposal from:

BMO Financial Group ("BMO")

RBC Dominion Securities Inc. ("RBC")

A copy of each comment letter submitted in response to the Stabilization Proposal is publicly available on the website of IIROC (www.iiroc.ca under the heading "Policy" and sub-heading "Market Proposals/Comments").

The following table presents a summary of the comments received on the Stabilization Proposal together with the response of IIROC to those comments. Column 1 of the table highlights the revisions to the Stabilization Proposal made by IIROC in response to these comments and the comments of the Recognizing Regulators.

Text of Provisions Following Adoption of Amendments (Changes from the Stabilization Proposal Highlighted)	Commentator and Summary of Comment	IIROC Response to Comment and Additional IIROC Commentary
1.1 Definitions **"best independent bid price"** means the best bid price, other than for an order that a dealer-restricted person knows or ought reasonably to know has been entered by or on behalf of a person that is a dealer-restricted person or an issuer-restricted person.		
"connected security" means, in respect of an offered security: (a) a listed security or quoted security into which the offered security is immediately convertible, exchangeable or exercisable unless the price at which the offered security is convertible, exchangeable or exercisable is greater than 110% of the best ask price of the listed security or quoted security at the commencement of the restricted period; (b) a listed security or quoted security of the issuer of the offered security or another issuer that, according to the terms of the offered security, may significantly determine the value of the offered security; (c) if the offered security is a special warrant, a listed security or quoted security which would be issued on the exercise of the special warrant; or (d) if the offered security is an equity security, any other equity security of the issuer that is a listed security or quoted security.		

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"dealer-restricted person" means, in respect of a particular offered security: (a) a Participant that: … (ii) is participating, as agent but not as an underwriter, in a restricted private placement of securities and the Participant has been allotted or is otherwise entitled to sell more than 25% of the securities to be issued under the restricted private placement, …		
"Exempt Exchange-traded Fund" means a mutual fund for the purposes of applicable securities legislation, the units of which: (a) are a listed security or a quoted security; and (b) are in continuous distribution in accordance with applicable securities legislation but does not include a mutual fund that has been designated by the Market Regulator to be excluded from this definition.		
"restricted period" means, for a dealer-restricted person or an issuer-restricted person, the period: (a) in connection with a prospectus distribution or a restricted private placement of any offered security, commencing two trading days prior to: (i) the day the offering price of the offered security is determined, if the securities are to be issued at a fixed price as part of a non-continuous distribution, or (ii) the issuance of the offered security, if the securities are issued as part of: (A) a continuous distribution, (B) a distribution at a non-fixed price permitted by National Instrument 44-101 – Short Form Prospectus Distributions, or (C) an at-the-market distribution for the purposes of National Instrument 44-102 – Shelf Distributions, <u>and ending on the date the selling process has ended and all stabilization arrangements relating to the offered security are terminated</u> provided that, if the person is a dealer-	**RBC –** Extension of the restricted period until the expiry of the "rights of rescission" would make the period unduly long. Suggests that consideration be given to following more closely the structure of Reg M under which restrictions commence on pricing and apply for a fixed number of days.	IIROC has adopted the suggested change with respect to the deletion of reference to "rights of rescission". Given differences in liquidity between US and Canadian markets, IIROC believes that it is prudent for restrictions to begin prior to pricing to avoid undue influence on the establishment of the price. IIROC also believes that the restrictions should continue until subscribers can not withdraw from their subscription under the prospectus offering. IIROC has made a further revision which moves the proposed provision dealing with outstanding options under a greenshoe arrangement from the definition of "restricted period" in Rule 1.1 to the interpretation of "restricted period" in Rule 1.2.

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restricted person, the period shall commence on the date the Participant enters into an agreement or reaches an understanding to participate in the prospectus distribution or restricted private placement of securities, whether or not the terms and conditions of such participation have been agreed upon if that date is later that determined for the purposes of clause (i) or (ii)~~,~~ ~~and ending on the date that is the earlier of the date:~~ ~~(iii) the selling process has ended and all stabilization arrangements relating to the offered security are terminated, and~~ ~~(iv) the offered securities, exclusive of any securities that may be issued pursuant to the exercise of an option granted to a dealer-restricted person to cover over-allotment of securities in the distribution, are issued and all statutory rights of withdrawal or rights of rescission in connection with such issuance have expired;~~ (b) in connection with a securities exchange take-over bid or issuer bid, commencing on the date of dissemination of the securities exchange take-over bid circular or issuer bid circular or similar document and ending with the termination of the period during which securities may be deposited under such bid, including any extension thereof, or the withdrawal of the bid; and (c) in connection with an amalgamation, arrangement, capital reorganization or similar transaction, commencing on the date of dissemination of the information circular for such transaction and ending on the date for approval of the transaction by the securityholders that will receive the offered security or the termination of the transaction by the issuer or issuers.		
"restricted private placement" means a distribution of securities made pursuant to: (a) section 2.3, 2.9 or 2.10 of National Instrument 45-106 – *Prospectus and Registration Exemptions*; or (b) section 2.1 of Ontario Securities Commission Rule 45-501 – *Ontario Prospectus and Registration Exemptions* or similar provisions of applicable securities legislation, and the number of securities to be distributed constitutes more than 10% of the issued and		

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outstanding securities of the class subject to the distribution.		
1.2 Interpretation (6) For the purposes of the definition of "restricted period": (a) the selling process shall be considered to end: (i) in the case of a prospectus distribution, if a receipt has been issued for the final prospectus by the applicable securities regulatory authority and the Participant has allocated all of its portion of the securities to be distributed under the prospectus and all selling efforts have ceased, and (ii) in the case of a restricted private placement, the Participant has allocated all of its portion of the securities to be distributed under the offering; (b) stabilization arrangements shall be considered to have terminated <u>on the date that is the earlier of when:</u> <u>(i)</u> in the case of a syndicate of underwriters or agents when, in accordance with the syndication agreement, the lead underwriter or agent determines that the syndication agreement has been terminated such that any purchase or sale of a restricted security by a Participant after the time of termination is not subject to the stabilization arrangements or otherwise made jointly for the Participants that were party to the stabilization arrangements<u>, or</u> <u>(ii) the offered securities, exclusive of any securities that may be issued pursuant to the exercise of an option granted to a dealer-restricted person to cover over-allotment of securities in the distribution, are issued and all statutory rights of withdrawal in connection with such issuance have expired;</u> and (c) if the offering price is determined by a formula involving trading activity in the offered security or a connected security on one or more marketplaces for a period of time, the offering price shall be considered to be determined on the first trading day included in the calculation for the purposes of the formula.		The revision moves the proposed provision dealing with outstanding options under a green shoe arrangement from the definition of "restricted period" in Rule 1.1 to the interpretation of "restricted period" in Rule 1.2.

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(8) For the purposes of determining the "best ask price" or the "best bid price at any particular time reference is made to orders contained in a consolidated market display for a marketplace that is then open for trading and in respect of which trading in the particular security on that marketplace has not been: (a) halted, suspended or delayed for regulatory purposes in accordance with Rule 9.1; or (b) halted, suspended or delayed in accordance with a Marketplace Rule or a requirement of the marketplace.		
3.1 Restrictions on Short Selling (2) A short sale of a security may be made on a marketplace at a price below the last sale price if the sale is: … (g) a trade in an Exempt Exchange-traded Fund; or …		Consideration of the proposal by IIROC to repeal price restrictions on short sales has been deferred. See IIROC Notice 08-0143 – Rules Notice – Notice of Approval – UMIR – *Provisions Respecting Short Sales and Failed Trades* (October 15, 2008). As a result, a consequential change to Rule 3.1 is required to recognize the adoption of the definition of an "Exempt Exchange-traded Fund".
7.7 Trading During Certain Securities Transactions (4) **Exemptions –** Subsection (1) does not apply to a dealer-restricted person in connection with: (a) market stabilization or market balancing activities where the bid for or purchase of a restricted security is for the purpose of maintaining a fair and orderly market in the offered security by reducing the price volatility of or addressing imbalances in buying and selling interests for the restricted security provided that the bid or purchase is at a price which does not exceed ~~the lesser of:~~ (i) in the case of an offered security, the lesser of: (A) the price at which the offered security will be issued in a prospectus distribution or restricted private placement, if that price has been determined, (B) the best independent bid price at the commencement of the restricted		The revision corrects a drafting error in the Stabilization Proposal.

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period if the price at which the offered security will be issued in a prospectus distribution or restricted private placement has not been determined or if the offered security will be issued pursuant to a securities exchange take-over bid, an issuer bid or an amalgamation, arrangement, capital reorganization or similar transaction, and (C) the best independent bid price at the time of the entry on a marketplace of the order to purchase, (ii) in the case of a connected security, the lesser of: (A) the best independent bid price at the commencement of the restricted period, and (B) the best independent bid price at the time of the entry on a marketplace of the order to purchase, provided that if the restricted security has not previously traded on a marketplace, the price also does not exceed the price of the last trade of the security executed on a foreign organized regulated market other than a trade that the dealer-restricted person knows or ought reasonably to know has been entered by or on behalf of a person that is a dealer-restricted person or an issuer-restricted person; (b) a restricted security that is: (i) a highly-liquid security, (ii) a unit of an Exempt Exchange-traded Fund, or (iii) a connected security of a security referred to in subclause (i) or (ii); …		
(7) **Transactions by Person with Market Maker Obligations –** Despite subsection (1), a dealer-restricted person with Market Maker Obligations for a restricted security may, for their market making trading account: … (c) bid for or purchase a restricted security:		

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(I) that is traded on another marketplace or foreign organized regulated market for the purpose of matching a higher-priced bid posted on such marketplace or foreign organized regulated market, …		
Policy 1.1 Definitions **Part 2 – Definition of "Exempt Exchange-traded Fund"** An "Exchange-traded Fund" is defined, in part, as a mutual fund for ~~the purposes~~ the purposes of applicable securities legislation, the units of which are a listed security or a quoted security and are in continuous distribution in accordance with applicable securities legislation. The definition excludes a mutual fund that has been designated by the Market Regulator to be excluded from the definition. As guidance, a mutual fund may be designated by the Market Regulator if the Market Regulator determines that the trading price of units of the fund may be susceptible to manipulation due to a particular feature of the mutual fund. Factors which the Market Regulator would take into account in making a designation to exclude a particular mutual fund would be: ● the lack of liquidity or public float of the security (or the underlying securities which comprise the portfolio of the mutual fund); ● the absence of the ability to redeem units at any time for a "basket" of the underlying securities in addition to cash; ● the absence of the ability to exchange a "basket" of the underlying securities at any time for units of the fund; ● the fact that the fund does not frequently make a net asset value calculation publicly available; and ● the fact that there are no derivatives based on units of the fund, the underlying index or the underlying securities listed on a marketplace. None of these additional five factors is determinative in and of itself and each security will be evaluated on its own merits.		The revision corrects a drafting error in the Stabilization Proposal.

Text of Provisions Following Adoption of Amendments (Changes from the Stabilization Proposal Highlighted)	Commentator and Summary of Comment	IIROC Response to Comment and Additional IIROC Commentary
Specific Matters on Which Comment is Requested ***Definition of "Highly-Liquid Security"*** *1. Should the list of "highly-liquid securities" be updated less frequently than each trading day? If so, what would be the appropriate frequency (e.g. weekly, monthly or quarterly)?*	**BMO –** List of qualified securities should continue to be updated daily.	IIROC does not propose a change to the calculation period at this time. However, if the concept is adopted for use in providing exemptions from price restrictions on short sales there may be a more pressing need to consider the appropriate calculation period. See Market Integrity Notice 2007-017 – *Request for Comments – Provisions Respecting Short Sales and Failed Trades* (September 7, 2007).
Harmonization with Requirements in the United States *2. Would there be any specific costs or benefits associated with UMIR adopting additional provisions comparable to those in the United States related to market stabilization activities?*	**BMO** – Does not see any "compelling benefit" in implementing requirements comparable to proposed amendments to Reg. M.	IIROC is not proposing any amendments to correspond with the current proposals to amend Reg. M.
3. Would there be any specific benefit in adjusting for inflation the $1,000,000 threshold for average daily trading value under the definition of "highly-liquid security"?	**BMO –** Does not see any benefit in adjusting the current threshold.	IIROC is not proposing any adjustment in the dollar amount of the threshold to qualify as a highly-liquid security.
Prohibitions and Restrictions on Distributions "At-the-Market" or "Non-Fixed Price" *4. Should RS consider amending UMIR at this time to deal with dealer-restricted persons bidding for or purchasing restricted securities during a restricted period for an "at-the-market" distribution and a "non-fixed price" offering or should any amendments be deferred until there has been more experience with such offerings?*	**BMO** – Believes that amendments should be deferred until these types of distributions become more commonplace.	IIROC will monitor "at-the-market" and "non-fixed price" offerings and any proposals to amend the UMIR requirements will be made in conjunction with proposals to amend OSC Rule 48-501.
5. If amendments should be considered at this time, are the possible provisions set out in Appendix "C" appropriate?		
Additional Exemptions When Acting on Behalf of an Issuer-Restricted Person *6. Should RS consider providing similar exemptions to permit a dealer-restricted person to act as agent on a bid or purchase by an issuer-restricted person for these types of orders?*	**BMO –** Believes that similar exemptions should apply when acting on behalf of an issuer-restricted person.	IIROC is not proposing the amendments at this time. Any proposals to amend the UMIR requirements regarding acting on behalf of an issuer-restricted person will be made in conjunction with proposals to amend OSC Rule 48-501 that may be initiated by the OSC.

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7. *Should RS consider providing additional exemptions to permit a dealer-restricted person to act as agent for certain insiders of the issuer of a restricted security? If so, what approach to providing such exemption would be preferable?*	**BMO –** Supports an exemption tied to exemption from insider reporting requirements. Agrees that the exemption should not apply to purchases under a normal course issuer bid.	IIROC is not proposing any amendment at this time. Any proposal to amend the UMIR requirement to provide such exemptions will be made in conjunction with proposals to amend OSC Rule 48-501 that may be initiated by the OSC.

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Chapter 25

Other Information

25.1 Consents

25.1.1 East West Resource Corporation – s. 4(b) of the Regulation

Headnote

Consent given to an offering corporation under the Business Corporations Act (Ontario) to continue under the Business Corporations Act (British Columbia).

Statutes Cited

Business Corporations Act, R.S.O. 1990, c. B.16, as am., s. 181.
Securities Act, R.S.O. 1990, c. S.5, as am.

Regulations Cited

Regulation made under the Business Corporations Act, Ont. Reg. 289/00, as am., s. 4(b)

IN THE MATTER OF
THE REGULATION MADE UNDER
THE BUSINESS CORPORATIONS ACT
(ONTARIO), R.S.O. 1990, c. B-16, AS AMENDED
(the "OBCA")
R.R.O. 1990, REGULATION 289/00
(the "Regulation")

AND

IN THE MATTER OF
EAST WEST RESOURCES CORPORATION

CONSENT
(Subsection 4(b) of the Regulation)

UPON the application (the "**Applicatio**n") of East West Resource Corporation (the "**Applicant**") to the Ontario Securities Commission (the "**Commission**") requesting a consent from the Commission to continue in another jurisdiction pursuant to subsection 4(b) of the Regulation;

AND UPON considering the Application and the recommendation of the staff of the Commission;

AND UPON the Applicant having represented to the Commission that:

1. The Applicant is a corporation existing under the provisions of the OBCA. The registered office of the Applicant is located at 40 King Street West, Suite 5800, Toronto, Ontario, M5H 3S1;

2. The Applicant is proposing to submit an application to the Director under the OBCA for authorization to continue in another jurisdiction pursuant to Section 181 of the OBCA (the "**Application for Continuance**");

3. Pursuant to subsection 4(b) of the Regulation, where an applicant corporation is an "offering corporation", the Application for Continuance must be accompanied by the consent from the Commission;

4. The Applicant is an "offering corporation" under the OBCA and is a "reporting issuer" under the *Securities Act* (Ontario) (the "**Securities Act**");

5. The Applicant is also a reporting issuer in British Columbia and Alberta;

6. The Applicant intends to remain a reporting issuer in Ontario;

7. The Applicant is not in default of any of the provisions of the Securities Act or the rules and regulations thereto or under the securities legislation of any other jurisdiction where it is a reporting issuer;

8. The Applicant is not a party to any proceeding or to the best of its knowledge, information and belief, pending proceeding under the OBCA or under the Securities Act;

9. The Applicant's shareholders authorized the continuance of the Applicant as a corporation under the *Business Corporations Act*, S.B.C. 2002, c. 57, as amended (the "BCBCA") by special resolution at a shareholders meeting held on October 26, 2009;

10. Pursuant to section 185 of the OBCA, shareholders entitled to vote at the meeting had the right to dissent from the Applicant for Continuance, and the information circular disclosed full particulars of this right in accordance with applicable law. No shareholders elected to dissent.

11. The principal reason for the continuance to the BCBCA is that the Applicant's management believes that the interests of the Applicant will be better served under the BCBCA as the Company's head office and its management will be located in British Columbia; and

12. The Applicant's material rights, duties and obligations under the BCBCA will be substantially similar to those under the OBCA.

AND UPON the Commission being satisfied that to do so would not be prejudicial to the public interest;

THE COMMISSION HEREBY CONSENTS to the continuance of the Applicant as a corporation under the BCBCA.

Dated the 22nd day of December, 2009.

"James D. Carnwath"

"Kevin J. Kelly"

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